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ack.
Trials per Pais.

OR THE *duplicate*
LAW of ENGLAND
CONCERNING
JURIES
BY
NISI PRIUS, &c.

With a Compleat TREATISE of
The Law of EVIDENCE,
Precedents, and Forms of Challenges, Demurrers
upon Evidence, Bills of Exception, Pleas *Pais le Darrein Continuance*, &c.

The Fifth Edition with large Additions.

To which are now added,

Such Resolutions and Acts of Parliament, as have
made any Alteration in the Laws relating to Trials by Juries,
down to this present Year 1718. and the Whole put into such a
Method as may render it most useful and easy to the Practiser.

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whole Matter.

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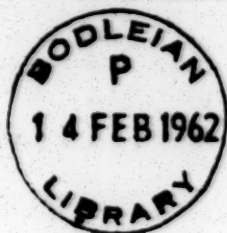
By **GILES DUNCOMBE** late, of the Inner-Temple Esq;

*Per testes solum lex ipsa nunquam litem dirimit, quæ per Juratam xii.
hominum decidi poterit. Cum sit modus iste ad veritatem eliciendam
multo potior, & efficacior, quam est forma aliquarum aliarum legum
orbis. Fortescue, Cap. 31.*

In the *SAVOY*, Printed by **Eliz. Nutt**, and **R. Golling**, Assigns
of **Edw. Sayer** Esq; for **J. Malthoe** in the *Middle-Temple-Choysters*;
and **J. Malthoe, jun.** against the *Royal-Exchange* in *Cornhill*. 1718.

I Do allow the Printing and Publishing of this BOOK, Entitled, *Trials per Pais* : Or, *The Law of England, concerning Juries by Nisi prius.*

Fr. Pemberton.



Ded

To the Practisers of the Law.

Gentlemen,

IN the Dedication of Books, such Persons should be chosen whose Studies and Profession agree with the Nature of the Subject. To prove Conclusions in one Science by the Heterogene Principles of another; to make a Grammariam Patron to a Piece of the Mathematicks; to dedicate a Treatise of Logick to a Master of Musick; or a Matter of Practice to a Man of Speculation; would not only be improper, but absurd. You know that in the whole Practice of the Law, there is nothing of greater Excellency, nor of more frequent Use, than Trials by Juries. In this, our Common Law (and not without just Cause) values it self beyond the Imperial Law, before the Canon Law, or any other Laws in the World. And seeing the Hopes and Life of all

To the Practisers

the Process, the Force of the Judgment and the Truth, nay, the Right of the Parties lie in the Trial ; for as one elegantly says, Qui non probat, at the Trial, dicitur veritate & jure carere; and indeed the Knowledge of all the Law tends to this : For without Victory at the Trial, to what Purpose is the Science of the Law ? The Judge can give no Sentence, no Decision without it, and must give Judgment for that Side the Trial goes ; therefore I may well say, 'tis the chief Part of the Practice of the Law : And if so, to whom should I offer this Treatise, but to you the Practisers ?

I need say nothing for small Tracts and Treatises ; the infinite Number of them in the Civil Law (there being for every Title a distinct Tract) nay the Number of them in our Law, sufficiently shew their Use.

Joachimus Forbus Ringelbergius, in his Book de ratione Studii, giving Directions what Books Students ought to carry with them, when they change

of the L A W.

change Places, and travel from one to another, tells us, that out of the Volumes, (by Reason of their Bigness not portable) he used to tear several Leaſs, and take them with him in his Journeys, and ſo he ſaid he had ſerved the Works of Pliny, Tully, Plato, Demosthenes, &c. although he had given great Prices for them; which juſtifies the writing of this Treatiſe, the ſubject Matter thereof being of ſuch general Uſe in all Circuits.

When I read the elaborate Books of Farinacius de Teſtibus, and the three exquisite and incomparable Volumes of Mascardus de Probationibus, in the Cæſarian and Pontifical Laws, (which Works were ſo valued and eſteemed, that they were looked upon as new Lights ſent from Heaven, by the Profeſſors of thoſe Laws) I could not but ſee the Deſect and Want of ſuch Books in our Law: For ſurely they are as neceſſary in the one as in the other. And although I cannot compare my weak Endeavours

To the Practisers

with those Excellent and Methodical Works, theirs being intire, this only quasi an Abridgment, fitted for Use, not for Show : Yet until more learned and judicious Proficients in our Law shall undertake the Work, I thought fit to produte mine.

To compare this Sort of Trial by Jury, with the Trials of other Laws and Countries, and declare how much and wherein it excels them all, after Fortescue de laudibus, &c. and his learned Commentator, would be like the Arrogance of Limning after Appelles, and requires the Room of a Volume, rather than an Epistle. And considering my own Insufficiencies, I shall praise it more by saying nothing, than all I can : For to say less than a Thing deserves, would be, instead of an Encomium, a Disparagement. Therefore I shall content myself, only to say, That Trials in other Laws are by Witnesses only, privately examined ; This, by Witnesses publicly examined and confronted ; and by
Jury

of the L A W.

Jury also, and so consequently the Fact is settled, with the greater certainty of Truth, upon which the Uprightness of the Judgment depends.

It would be well if there were less Corruption in the returning of Juries; but I think 'tis parallel'd, if not exceeded by that of examining Witnesses privately, on whose Depositions, the Trials in other Laws consist: And so there must be no Objection against the thing. I hope an Expedient may be found out to prevent the Corruption in returning Juries, but I believe it never can in the other.

To say this Trial by Jury is too popular in a Monarchy, would be a good Objection from a Frenchman, but not of any Englishman, who lives under the best tempered Monarchy, and the best sort of Government in the World, to which this manner of Trial is so proper and accommodated, that neither the Wisdom of our Ancestors could, nor (I may say) can this present, nor After-Ages invent a better. But

To the Practisers, &c.

But as the unskilful Painter drew a Curtain before what he could not express with his Pencil, so must I veil with Silence, the Excellencies of this celebrated Trial, which I am not able to delineate.

Gentlemen,

*To make an Apology for the Style of a Law-Book, especially of an Epitome, would be a vain Thing; Ornari res ipsa negat, contenta doceri; neither shall I make any Apology for my undertaking this Work: If 'twas better perform'd, yet Momus would be carp-
ing; and if 'twas worse, it would be good enough for him, who cannot, or will not do it better: Be it what it will, your kind Reception will abundantly satisfy*

Your Servant,

G. Duncombe.

T H E

THE
PREFACE
TO THE
FIRST EDITION.

THE Philosopher could not see a Man unless he heard him speak ; *Loquere ut videam.* Speech is the Index of the Mind, and the Mind only discriminates the Man. For although an *Ideot*, who hath but the Shape of a Man, may with Silence so hide his Folly, that Strangers to his Manners cannot discern him from a Sophister : Yet, doubtless, Silence is the greatest Enemy to Learning, the Grave wherein Oblivion buries the Parts and Knowledge of the bravest Spirits.

Where-

The PREFACE.

*Histor. facil.
Princeps.*

Wherefore learned Sallust, from this takes his *Exordium* ; *Omnes homines qui sese student præstare cæteris animalibus, summa ope niti decet, ne vitam silentio transeant, veluti pecora* : Those Men who would excel Beasts, should labour that their Lives might not pass in such Silence, as Beasts do. It seems he deemed that Man little inferior to a Beast, who acted nothing to prolong his Memory : For this he held to be the Duty of every Man, saying, *Quo mihi rectius esse videtur, ingenii quam virium opibus gloriam querere ; & quoniam vita ipsa, qua fruimur, brevis est, memoriam nostri quam maxime longam efficere* : In my Opinion, 'tis far better to acquire Glory by the Riches of Wit, than Strength ; and because our Lives are short of themselves, we should endeavour by Ingenuity to eternize their Memory.

*Nulla dies sine
linea.*

And to effect this, *Nulla dies abeat, quin linea ducta supersit* : No Day should pass over our Heads wherein we should not act some memorable Exploit : Men should not live like *Snails*, never stirring out of their Houses ; but be active (I mean not Busy-bodies in other Mens Matters, but) in their own Callings,

The P R E F A C E.

lings, of which the Wise Cato tells us, Every Man should give a reasonable Account : And if we believe the famous Seneca, *Nihil est turpius quam grandis in senex, qui nullum habet vitæ suæ augmentum, quo diu se vixisse dicat, præter ætatem* : Nothing is more unworthy than an old Man, who has nothing to shew for his Antiquity, but a grey Beard ; whose Soul served only as Salt to keep his Body sweet, and is no sooner dead, than forgotten, long before he is half rotten ; yet who is so apt to deride the Endeavours of other Men, as this ancient Ignoramus, whose Wrinkles in his Face, worn-out Looks, and many Years sway more with the vulgar People, than all the Arguments of Law or Reason ? Had Seneca been such a silent Momus, the World would never have been blest with his so Learned Works. And doubtless writing Books is needful in no Science more than in the Law. For without Books, how would the Lawyers do for Arguments at the Bar, or Resolutions at their Chambers ; whence the Oracle Sir Edward Cook pronounces this, *Omnes debere Jurisprudentiæ libris componendis animam adjicere* : That all Men ought to add themselves to the Composing Books of Law ;

The PREFACE.

Law ; some to the Reporting of the Judgment and Resolutions of the Judges, who are *Lex Loquens* ; and some to the collecting of these Cases and Resolutions, methodizing and fitting them for some particular Purpose, as *Littleton, Staundford, Fitzherbert, Crompton, Perkins, Finch, &c.* And indeed, most of the Law-Books extant, if not all, (setting aside the Reports) are nothing else, but Collections out of others. This I speak, not in Derogation of them, in the least ; for as 'tis equally, if not more laborious, so 'tis full as glorious, judiciously to cull Authentick Cases out of the Volumes of the Law (where so many are no Law) and rightfully place them in a particular Treatise, as 'tis to report the Judgments and Resolutions from the Mouth of the Court ; for the Reporter is but the Court's Secretary, and *Coke's Institutes* merit as much as his Reports ; and *Asb's Tables, Fitzherbert and Brook's Abridgments* are as useful as the Year-Books themselves, of which kind of Collections, one elegantly thus breaks out, *Quo quidem beneficio, haud scio, an aliud aut legum Candidatis magis gratum, aut Reipublica magis commodum, aut divini honoris illustrationi magis idoneum, vel cogitando quidem consequi quisquam poterit.* Than

The PREFACE.

Than which Benefit I know not whether any Man can ever imagine another, either to Lawyers more grateful, or to the Commonwealth more profitable, or for the Illustration of Divine Honour more fit. For with the least Labour, a small Price, and little Time, they present you with those Resolutions and Judgments which lie scattered in the voluminous Books of the Law ; which would otherwise cost much Time, Pains and Charges to find out. The Thoughts of which Publick Good first gave Life to these Endeavours of mine : Not that any one should in the least imagine, that I am so guilty of vain Ostentation, as to believe, that my Parts or Abilities can perform any Thing in this kind like other Men : No, *Ipsæ mihi nunquam Judice me placui.* I could never yet please my self with my own Labours, much less are they worthy to please others ; *haud equidem tali me dignor Honore.* However, when I consider, that no Man hath yet written particularly concerning this Subject, and of what general Use it is ; I doubt not but that this Treatise will receive a favourable Construction from most Men, and a plausible Acceptation from others.

The PREFACE.

The Use of
th: Book.

The Use of it is in a Manner Epidemical; since most Mens Lives and Estates are subject to that Trial *Per Pais*, here demonstrated; but in particular, the Practisers at Law, (especially *Circuit-Advocates, Attorneys, Solicitors, Clerks, &c.*) and all *Jurors* (for whose Directions it is of singular Use) are chiefly concerned herein. But I will not hang a Bush out, to invite and prepossess your Judgments, *Vincat Utilitas*. The Profit which every ingenious Reader shall gather out of it, will speak more for it, than the best Eulogical Preface.

And for my own Part, I profess myself to be *Philomathes*, but not *Polymathes*. And notwithstanding the hard-favoured Objections which some Men cast upon it, I really think the Study of the Law to be the most pleasant Study in the World. And he which delighteth in the Study of any other Art or Science, must consequently be delighted with this. For the Knowledge of the Law, as *Dodderidge* saith, is most truly styled, *Rerum Divinarum humanarumque scientia*, and worthily imputed to be the Science of Sciences for therein lies hid the Knowledge of every other Learned Science.

So

Trials per Pais.

CHAP. I.

The Derivation of the Word Jury. The Definition, Antiquity and Excellency of Juries.

JURY (*Jurata*) cometh of the French Word *Jurer*, i. e. *Jurare*; and signifieth in Law, *Jury*. *Vid. Chap. 12.*
those twelve Men who are sworn Judges in Matters of Fact, evidenced by Witnesses, and debated before them: I call them Judges, because, as 'tis the Property of the Court, *ius dicere*; so 'tis in the Power of the Jury to determine the Fact, upon an Evidence *Pro* and *Con*; according to those common Adages, *Ad quæstionem Juris respondent Judices; Ad quæstionem Facti respondent Juratores*; And as the Judgment of the Court ought to be guided by the Law, so is the Verdict of the Jury by the Evidence. They of the Jury are called *Juratores*, *Vid. cap. 19.*
Jurors, à *jurando*, as in ancient Laws *Sacramentales*, à *Sacramento præstando*.

I need not here divide, and shew the Differences of Juries, nor the several Sorts, they being so well known, viz. The Grand Jury, or Great Inquest, and Petty Jury, or Jury of Life and Death, in Criminal Causes; and in

The Antiquity and Excellency of Juries.

B

Civil

Of the Antiquity and Excellency Ch. 1.

Civil Causes the *Assize Jury*. *Inquest of Office*, by some called *Inquest of Jury*, and *Inquest of Office*. Something concerning each of these, will incidently be spoken of in what follows. As to the Excellency of *Juries*, it appears from their Antiquity.

Sir Henry Spelman, *verb.* (*Inquæstio*) says, Trial by *Juries* was used in England, *Normanis nondum ingressis*, *Leg. Ed. Confess. ca. 38. Postea inquisisset Justitia, i. e. (Justitiarius) per Lagamannos, i. e. (legales homines) & per meliores homines de Burgo, vel de Villa, vel de Hundreda, ubi mansisset Emptor, &c.*

For as to the Trial by twelve Men, though Mr. Daniel and Polydore Virgil deny it to be older than the Conquest, and the later says there is no Religion in it, but in the Number; yet he stands fairly corrected, by that excellent and learned Antiquary, Mr. Camden p. 153. who says, *Whereas Polydore Virgil writeth, That William the Conqueror first brought in the Trial by twelve Men, there is nothing more untrue; for it is most certain and apparent by the Laws of Ethelred, that it was in use many years before, &c.* And whereas Lamb. *verb.* (*Centuria*) says, *In singulis Centuriis Comitia sunt, atque liberæ Conditionis viri duodecim, ætate superiores, una cum Præposito Sacra tenentes jurento, se adeo virum aliquem innocentem laud damnaturos, fontem-ve absoluturos*, he refers to the Laws of Ethelred, chap. 4. cited by the Learned Spelman, *verb.* (*Jurata.*)

And to the same doth my Lord Coke refer *Com. super Lit. 155.* and Preface to his third and eighth Report. And as to the Religion in the number of twelve, my Lord Coke gives instances *ubi supra*, and Sir Henry Spelman, in *verb.* (*Jurata*) *supra*, makes Addition thereto.

So

So that I may truly say, Trials by *Juries* have been used in this Nation Time out of Mind, and were contemporary and coeval with the first Civil Government thereof, and Administration of Justice; for amongst the first Inhabitants, the *Britains*, the *Freeholders* were used in all Trials.

And Trial by *Juries* was (as you see practised by the *Saxons*) continued by the *Normans*, and confirmed by *Magna Charta*. And was ever so esteemed and prized in this Island, that no Conquest, no Change of Government ever prevailed to alter it.

'Tis true, Trials by *Juries* before the time of H. 2. were not so frequent, because *Sadae* or *Purgationes*, *Ordalia*, Trials by hot Iron, hot Water, cold Water, Duels, and other superstitious Ways were then in Use; but Trials by *Juries* were here in the *Saxons* Time, and were found here, and not brought in by *William* the Conqueror from *Normandy*; nay, rather settled by *Edward* the Confessor in *Normandy*, where he a long Time was, and taught many Laws, as you may see in the Book of the Customs of *Normandy*.

Glanvil lib. 2. cap. 7. says, *Ex æquitate autem maxima prodita est legalis ista institutio*, speaking of these Trials in Opposition to Duels, &c.

Their general Use (being the only Triers of *Choses in fait*, almost in all Courts throughout England,) speaks them a publick Good. To be tried by one's Peers is the greatest Privilege a Subject can wish for; and so excellent is the Constitution of the Government of this Kingdom, that no Subject shall be tried but by his Peers. The Lords by theirs, the Commons by theirs; which is the Fortrefs and Bulwark of their Lives, Liberties and Estates: And if

The use of
Juries.

the Good of the Subject be the Good of the King, as most certainly it is, then those are Enemies to the Good of the King and State, who attempt to alter or invade this fundamental Principle, in the Administration of the Justice of this Realm, by which the King's Prerogative has flourished, and the just Liberties of the People have been secured so many Ages.

Fortescue.
ca. 29.

And what Answer shall I make to the Prince's, *vehementer admiror*, (videlicet, Wherefore are not *Juries* used in other Countries, if they are so good ?) but that of *Fortescue*, the Learned, who best could tell, *scil.* That other Countries can scarce produce one *Jury* so well accomplished with *Wealth* and *Ingeny*, as one County, nay, one Hundred can in England.

Things, not
Words, most
regarded in
the Law.

Binch. c. 3.

But not to dwell in the *Porch*, I will address my self to the *Gravity* of the *Law*, where you must not so much expect the *Flash* of *Rhetorick* as the *Light* of *Reason*; no, the *Law* knows best how to express her self in her own *Terms*; wherefore all other *Sciences* must learn, with Reverence, to keep their Distance, and, (as the Golden *Finch* sings) be glad to have their *Sparks* raked up in her *Ashes*.

And since an *Issue* is *previous*, and the Matter of a Trial, I shall first give you the Description thereof, and then touch upon the several Trials allowed by the Law, for the Discussion of the Truth.

C H A P. II.

Of an Issue, and divers Sorts of Trials thereof; and when a Trial shall be by a Jury, and when not; when by Certificate, when by the Spiritual Law, when by Battel, and when by an Almanack; when Issue shall be first tried per Pais; what shall be tried by the Court; and what by Examination of the Attorney, Sheriff, &c.

Issue, (*Exitus*) saith Coke, is a single, certain and material Point, issuing out of the Allegations and Pleas of the Plaintiff and Defendant, consisting regularly upon an Affirmative and Negative, to be tried by twelve Men: And it is two-fold, *scil.* either special, as where the special Matter is pleaded; or general, as in Trespass, Not Guilty: In Assize, nul tort, nul disseisin, &c. And as an Issue natural cometh of two several Persons, so an Issue legal, issueth out of two several Allegations of adverse Parties.

And to give you likewise his Definition of Trial, It is to find out, by due Examination, the Truth of the Point in Issue, or Question between the Parties, whereupon Judgment may be given: And as the Question between the Parties is two-fold, so is the Trial thereof; For either it is *questio juris*, (and that shall be tried by the Judges, either upon a Demurrer, the best way to give Judgment upon the *questio juris* first, yet the Court may try the *questio facti* first, at their Discretion. *Inst* 72. 127. *1 Lach. 4. Roll. tit. Trials, 626. 723.*

1 Inst. f. 126. Omnia unum aliquem sortiuntur exitum, vel per patriam, vel per Judices terminandum. Finch. Epistle.

Note, That upon a Demurrer to part, and Issue to part, though it is

B 3

Special

Special Verdict or Exception : For, *Cuilibet in sua arte perito est credendum, & quod quisque noverit, in hoc se exerceat.*) or it is *quæstio facti* : And the Trial of the Fact is in divers sorts ; First, chiefly, and most commonly, by a *Jury* of twelve Men, (of which kind of Trial my Design is principally to treat in this Book.)

**Proceedings
in Civil
Causes.**

For by twelve Men are Matters of Fact (for the most part) tried with us in *England*, in Causes both Criminal and Civil ; in Causes Civil, after both Parties have said what they can, one against another, in Pleading ; if there arise a Question about any Matter of Fact, it is referred to twelve indifferent Men, to be impanelled by the Sheriff ; and as they bring in their *Verdict*, so Judgment passeth. And this the Judge is to declare as the Law is upon the Fact found : For the Judge saith, the *Jury* finds thus, and then the Law is thus, and so we judge. For the Law arises upon the Fact.

**Proceedings
in Criminal
Causes.**

For Criminal Causes, the Course is thus ; At the *King's Bench* for *Middlesex*, and at the great and general *Affizes*, and at the general *Sessions of the Peace*, there is one *Jury* called the *Grand Jury*, which consists commonly of twenty four substantial Men, out of every Hundred within the County, returned by the *Sheriff*, and they are to consider of all Bills of Indictment presented to them, which they either approve of by writing *Billa vera*, or disapprove by writing upon them *Ignoramus* ; and those which they approve of are to be tried by another *Jury* called the *Petit-Jury*. Or the *Grand Jury* may charge any Person, upon their own *Presentment*, which will be of the Force of an *Indictment* ; and the Party charged may traverse the Offence, and bring it to be tried by a *Petit Jury*.

Some

Some lesser Matters in these Courts are proceeded upon without *Jury*, and some Things are removed by *Certiorari* into higher Courts, and then must be tried there ; and that thing to which there is a Traverse put in, must be tried and ended by a *Petit-Jury*, which (for the most part) in all Civil and Criminal Causes are but twelve Men, which ought to be Free-Men, not Villains or Aliens, and lawful Men, not outlawed, and also Men of Worth and Honesty.

But because it is necessary to be known, that there are many Ways allowed by the Common Law to try Matters of Fact, besides this by *Juries*, I will here repeat some of them: And for this first hear the *Oracle*, who tells you, that he had read of six Kinds of *Certificates* allowed for *Trials* by the Common Law. Inst. 74.

1. The doing of Service by him that holdeth by *Escuage* in *Scotland*, was to be tried by *Certificate*. the King's Marshal of the Army, *Per son Certificate en escript south son seal que serra mis a Justices*, saith *Littleton*.

2. If it be alledged in Avoidance of an Outlawry, that the Defendant was in Prison at *Bordeaux*, in the Service of the Mayor of *Bordeaux*, it shall be tried by the Certificate of the Mayor of *Bordeaux*. Note, This was when *Bordeaux* was Parcel of the Dominions of the King of *England*. Roll. tit. Trial, f. 583.

3. For Matters within the Realm, the Custom of *London* shall be certified by the Mayor and Aldermen, by the Mouth of the Recorder. Vide apud 14.

4. By the Certificate of the Sheriff, upon a Writ to him directed, in Case of Privilege, if one be a Citizen or Foreigner.

5. Trial of Records by Certificate of the Judges, in whose Custody they are by Law. All these be in Temporal Causes.

6. In Causes Ecclesiastical, as Loyalty of Marriage, general Bastardy, Excommunication, Profession: These and the like, are regularly to be tried by the Certificate of the Ordinary. *Vide apud* 13.

If the Defendant claim his Privilege as a Scholar of the University of Oxon, of such a College or Hall: This shall not be tried by Certificate, but *per pais*. Roll. tit. Trial. 583.

Concerning Certificates of Spiritual Persons, *vide* Roll. *ibid.* 591, 592.

Records.

7. A Record shall be tried by the Record it self, and not *per Pais*. But Matter of Fact concerning a Record is triable by a Jury; as whether a Plaint, &c. was levied according to the Custom; and *non prosecutus est ullum breve*, is triable by the Country. Hob. 244. Hutt.

Mixt with
Fact.

20. So if a Statute hath two Seals, or but one, 1 Leon. 229. 2 Cro. 375. 1 Inst. 125. b. So in a *per quæ servitia*, if the Tenant say he held not of the Conusor *jour del note levie*, it shall be tried *per Pais*. In Escape upon a Capi returned, *ne unques in son gard*, shall be tried *per Record*; but upon a Capias not returned, the Prifal shall be tried *per pais*. So shall an Action brought by Corvin, for the Corvin is not of Record. In a *scire facias per Roy* to have Execution of a Judgment in a *Quare impedit*, if the Defendant say, That after the Recovery the King presented, & *issint Judgment execute*; and the issue be, whether the King presented,

Roll. tit.
Trial. 574.

per cause del Judgment, or of an Avoidance after the Death of J. S. who was presented by a Stranger after the Avoidance, upon which the King had Judgment? this shall be tried

Why there
needs no
visne, where
Letters Pa-
tents were
made; other-
wise in plead-
ing Deeds.
4 Kep. 71.

per

per pais. And for this reason, in pleading of *Letters Patent*, the Place need not be alledged where the *Letters Patents* were made, because the *Defendant* cannot plead *Nul tiel Record*, but must plead *Non concessit*, and then the Jury shall come from the Place where the Lands lie. *Vide li. 6. f. 15. 1 Inst. 117, 260. Plo. Com. 231.* But upon a *Non est factum* pleaded to a *Deed*, there must be a Place alledged where the *Deed* was made, because (though the *Deed*, as to the Matter of Law, be triable by the Court yet) the Sealing and Delivery thereof, and other Matters of Fact, must be tried by the Jury; so that in this Case of a *Deed*, there is a Trial *per Pais*, and by the Court. *1 Inst. f. 35. Vide apres 15.*

The Issue upon an Indictment, or Acquittal upon this shall be tried by the Record. So shall the Allowance of a Protection in Bank. The Imprisonment upon the Execution, and not for other Cause, in Escape. The Justification of an Imprisonment, because he is a Justice of Peace. A *Statute-Merchant*, Count or not Count, Baron of the Parliament, or Viscount or not. Whether a Place be within the Ligeance of the King of England, or in Scotland. A *Fine sur Release* rendring his Body in Discharge of his Bail, shall be tried by the Record. *Roll. tit. Trial 574.*

But in Escape against the Mayor of a Staple for suffering *f. S.* in Execution upon a *Statute-Staple*, to go at large, if the Defendant say he was not in Prison upon the Execution, but upon a *Plaint* there, this shall be tried *per Pais* and not *per Record*; because 'twould be unreasonable that the Defendant should certify a *Record*, where he himself was concerned. *ibid.*

The

The Time of inrolling *Letters Patents* shall be tried *per Pais*. *Co. Lib.* 4. 71. 9 *H.* 7. 2.

Office raising
a Record.

Siffrisin of an Office in any Court, or raising a Record in any Court, by the *Filazers* and *Attorneys* of the Court.

Peers.

The Lords
may com-
mand a Jury
to be impa-
nelled to try
Misdemeanors.

8. A *Peer* of the *Realm*, i. e. a *Lord* of the *Parliament*, shall upon an Indictment of Treason or Felony, Misprision of Treason, and Misprision of Felony, be tried by his *Peers*, without Oath, 1 *H.* 4. 2. But in Appeal at the Suit of the Party, he shall be tried *per probos & legales homines Juratores*. 10 *E.* 4. 6. &c. because that is not the King's Suit, but the Parties. *Vide lib.* 9. 31. *Le case del Abbot de Strata Marcella*. And in a *Præmunire*, his Trial shall be *per Pais*. *Bulstr.* 1 part. 198. Dutcheffes, Countesses, or Baronesses, although married, shall be tryed as *Peers* of the *Realm* are, but so shall not Bishops and Abbots. *Stam.* 153. 20 *H.* 6. 9. 2 *Inst.* 48, 49, 50. 156. b. 294. 2 *Inst.* 30. But Bishops shall be tried by the *Peers* in *Parliament*.

12. Rep. 93.
Lamb. In. f.
520. 3. *Inst.*
30.

Customs of
Courts, &c.
tried by the
Judges.

9. The Customs and Usages of every Court shall be tried by the Judges of the same Court, if they are pleaded in the same Court, *ib.* and many other things are tried by the Judges, as the reasonableness of a Fine of an Offender, or upon Surrender of a Copyhold Estate; and so it is of Customs, Services, and also of the Time that a Tenant at Will shall have to carry away his Goods; and these Cases come under the Rule which makes *Matter of Law* to be tried by the Judges; *Vide* 1 *Inst.* f. 56. And in some Cases *Matter of Fact* shall be tried by the Judges; as if the Plaintiff appear by *Attorney* in Court, and then the Defendant pleads that the Plaintiff is dead; If one appears, and saith he is the Plaintiff, whether he is or not, shall be

be tried by the Judges; lib. 9. 30. So the Non-age of an Infant, generally by Inspection of the Court. But in many Cases, Infancy shall be tried *per Pais*, as if an Infant appear by Attorney, in Error, this shall be tried *per Pais*, lib. 9. 31. and so it is in an *Etate probanda*. V. Bulst. 1 par. 131.
Roll. Tit. Trials 571.

Maibem: In an Appeal of *Maibem*, the Court may adjudge this upon the View, at the Prayer of the Defendant; and this Trial is peremptory to the Parties, by a Jury of Chirurgeons. *Vide Roll. tit. Trials 578.* Maibem.

Maibem may be tried again by the Court, by Inspection for Increase of Damages; but then these Things are to be considered; First, It must be a *Maibem*, and not a bare Wounding. Secondly, The *Maibem* must be ascertained in the Declaration, so as that it may appear, that the *Maibem* inspected, and the *Maibem* in the Declaration be all one, as was resolved, *Mich. 21 Car. 2. B. R.* in the Case of *Badwel and Burford*; the Principal Case of which was, That the Defendant whipp'd the Plaintiff's Horse, which made him throw her, and another Horse trod on her, and maim'd her Hand; and adjudg'd no Increase of Damages in that Case, being a consequential, and not a direct *Maibem*. Maibem.

Non-age in a *Writ of Error* to reverse a Judgment or a Fine of the Tenant by Resceit of one vouched *come deins age, & issint praie le parol a demurrer*, Non-age *sur aid praier en Appeal*, *Audita Querela*, to avoid a Statute, Recognizance, Accompt, and in all Actions where 'tis prayed that the *parol demurroit*, Non-age shall be tried *per Inspection*. But in Accompt against one of full Age, if he plead Non-age when he was Bailiff, this cannot be tried by Inspection, Trial by Inspection be-
cause of Re-
cord.

tion, *Roll. tit. Trials* 572. How this Trial by Inspection shall be, *vide Roll. ibid.* at large.

In all Cases where the Matter may be tried by Inspection, Examination or Discretion of the *Justices*, if they doubt the Matter, they may refuse to try this, and compel the Parties to a Trial *per Pais*, or other Proofs, 21 *H.* 7. 40. *per tous Justices.*

Trials by Witnesses and Proofs.

10. There are many Trials allowed by the Common Law, by Witnesses only, without a *Jury*; as of the Life and Death of the Husband, in *Dower*; so the Proof of a *Summons*, or the Challenge of a *Juror*, must be tried by Witnesses; and regularly, the Proof ought to be by two or three Witnesses, 1 *Inst.* 6. And divers other Things must be tried by Examination of the Parties and Witnesses, as the Trial by *Wager of Law*, &c. *Finch* 423.

V.4 *Inst.* 278.

Glanvil lib.
13. cap. 18.

Non-age was anciently tried by the Verdict of eight Men, but now by Inspection; and full Age by twelve Men.

Appeal.

In an Appeal by a *Feme* of the Death of her Husband, if the Defendant say that the *Baron* is alive in another County; or generally, that he is alive, this shall be tried by Proofs, 41 *Affise* 5. *Vide Roll. tit. Trial* 577. what shall be tried by Proofs in an *Affize*, and what not.

Annuity.

In a Writ of Annuity, if the Defendant say the Party is dead in *Britain*, this shall be tried by Proofs, 26 *E.* 3. 70.

Dukes, &c.

11. Duke or no Duke, Earl or no Earl, Baron or no Baron, shall be tried by the King's Writ, *lib.* 5. 35. *lib.* 6. 53. But *Dutchesss* or no *Dutchesss*, &c. by Marriage, shall be tried *per Pais*, because the Marriage is Matter of Fact.

League.

12. In a Plea *del alien nee*, the League between the King and the Sovereign of the *Alien*, shall be tried by the Record of the *Chancery*,

Chancery; because every *League* is of Record,
lib. 9. 32.

13. If a *Manor* be *Ancient Demefne*, or not, it *Manor*.
shall be tried by the Book of *Domesday*,
which is in the *Exchequer*. But whether cer-
tain Acres be parcel of such a *Manor*, or no,
it shall be tried by the Country, *ib.*

14. The Proceedings of a Court which is *Courts not of*
not of *Record* (as the County-Court, the *Record*.
Hundred-Court, the *Court-Baron*, &c.) shall
be tried by the Country, and not by the *Rolls*
of the Court, because they are no Record, *ib.*
Co. Lit. 117. b.

14. The Privileges and Liberties of Courts *By Charters*
of Record, Cities and Boroughs, must be tried *and Records*.
by their Charters and Records.

15. Whether the *Ordinary* committed *Admini- Wills and Ad-*
stration to the Plaintiff, or whether the *Testa- ministrations*.
ment was proved before the *Ordinary*, or whe-
ther such a Will be the Will of the Party, or
whether he died intestate or not? In all
these Cases the Trial shall be *per Pais*; because
Probate of Wills, and constituting Administra-
tors, did not belong to *Ecclesiastical Judges ori-*
ginally, but were given to them of late. But
Trial thereof is left to the Common Law, and
was not given to them, *lib. 9. 32. 40.*

An Executor brings an Action of Debt, the
Defendant pleads that the Testator never
made him Executor, if the Plaintiff gives in
Evidence the *Probate* of the Will, the Defen-
dant shall only give Evidence in *Disaffirmance* of
the Plaintiff's *Probate*, which is Matter of
Fact; but as to Matter of Law, the Court
gives Credit thereto; as where another Will
was made, for there the Parties might have
appealed; but if the Seal be counterfeit, or
the *Probate* forged, it's triable *per Jury. Adj.*
Pasch.

Pasch. 20 Car. 2. B. R. Noel and Wells. Vide Wentworth's Executor 69.

Criminal
Matters.

The Trial of all Criminal Matters is by the Country, and the Party accused cannot be denied it, unless it be his own Fault; as where he is mute, and will not put himself upon his Country in due Time; for then without farther Trial Judgment *de Pain fort & dure*, is passed by the Judges upon him, *Staundf. Pl. Coron. 150.*

Plo.Com. 267.
Special Bastardy.

16. In an Action upon the Case for calling one *Bastard*, the Defendant justified that the Plaintiff was a *Bastard*; And it was awarded that this should be tried *per Pais*, and not by the Ordinary, *Hob. 179. Devant 8.* And so a Plea that the Plaintiff was born at such a Place before Marriage, this is *special Bastardy*, and shall be tried *per Pais. Plow. 14. Dyer 89. vide hic cap. 22.*

Customs of
London,

17. When an Issue is taken, whether a *Custom* or no *Custom* in *London*, if the Mayor, Commonalty and Citizens be Parties, or interested in the Action, this Custom shall be tried by a *Jury*, and not by the Certificate of the Mayor and Aldermen, by the Recorder, *Hob. 85. Day and Savadge's Case. Devant. 2. Style 137. Moor 871. vide apres tit. Visne. Roll. tit. Trial 579, 580.*

The Custom of *London* shall be certified by the Mayor and Aldermen, by the Mouth of the Recorder, *Co. Lit. 74.*

In an Information upon the Statute 5 *Eliz.* for using a Trade to which the Defendant was not bound an Apprentice, if the Defendant plead a Custom of the City, That he who is free of one Trade, may use any other; this shall be tried by the Mouth of the Recorder.

Note,

Note this Difference, He that is free of one Manual Trade, cannot use another Manual Trade : But it is otherwise of those Trades which are not Manual : In such, one that is free of one, may use another by the Custom :

Liberties claimed by Custom in *London*, the Custom of making Indentures of Apprenticeship void, if not inrolled within a Year, the Custom to devise Lands, Foreign Attachment, &c. shall be tried by the Mouth of the *Recorder*. But the Issue, whether there be a Market every Day of the Week in *London*, shall be tried *per Pais*, because the Issue is not upon the Custom, *Roll. tit. Trials* 580. *Vide hic cap. 8.*

18. A Matter of Record being mixt with a Matter of Fact, shall be tried *per Pais*, and not by the Record. *Hob. 244. Peter and Stafford's Case, Devant 6.* Matter of Record mixt with Matter of Fact.

19. In Writs of Right and Appeals that touch Life, Trial may be by *Battel*, or by *Jury*, at the Defendant's Choice ; The *Battel*, in a Writ of Right, must be by *Champions*, (who must be Freemen,) but in an Appeal it must be in proper Person. The *Champions* in a Writ of Right, are not bound to fight longer than until the Stars appear ; and if the Champion of the Tenant can defend himself until then, the Tenant shall prevail : The *Judges* of the Court of *Common Pleas* are *Judges* of the *Battel*, in a Writ of Right ; and the *Judges* of the *King's Bench*, in an Appeal of Felony. It seems they seldom or never killed one another in this Trial of *Battel*, for their Weapons were but *Batoons*, and he that was vanquished, was presently upon *Proclamation* made to acknowledge his Fault in the Audience of the People, or else to cry *Cravant*

Trials by Battel. Writ of Right.

in the Name of Recreantise; and upon this Judgment was to be given, and after this the Recreant should *amittere liberam legem*, that is, should become infamous, &c. 2 Inst. 247. Finch. 421. lib. 9. 31. Mirror of Justice 161, 162. &c. 1 Inst. 294.

Grand Assize. Glanvil saith, The Trial by Grand Assize came by the Clemency of the Prince. *Est autem* (saith he) *Magna Assisa Regale quoddam beneficium, Clementia Principis, de consilio Procerum populis indultum.*

For the Trial of Treason, Murther and Felony, as well upon Appeals as upon Indictments, see Staundf. Pleas of the Crown.

By Glanvil cap. 1. lib. 14. it appeareth, the Trial of these Crimes by the old Law was this; If there were no direct Proof nor Accuser, or if there was any Accuser or direct Proof, yet if the Party denied the same, then the Trial was by Wager of Battel, if the Party accused was not sixty Years old, and of sound Limbs; but if he was older or not sound, then he was to be tried *per judicium Dei*, namely, *per calidum ferrum vel aquam*, that is, if he was a Freeholder, he was to run barefoot and bare-legg'd over a Row of hot Iron Bars, and if he passed three Times without Stop or Fall, he was acquitted. And if he was a meaner Person, called *Rusticus*, he was to run through Vessels filled with scalding Water.

Recovery by Default. 20. In a Writ of *Disceit*, upon a Recovery by Default, the Trial shall be, if the Judgment was given upon the *Petit Cape*, by the *Summoners*; if upon the *Grand Cape*, by the *Summoners*, *Pernors* or *Veiors*, and not *per Pais*: So if a Recovery by Default in a real Action be pleaded, to which the other said, *Nient comprise,*

Nient Com-
prise.

prise, this shall not be tried *per Pais*, but by the *Summoners* and *Veiors*, *lib.* 9. 32.

En Assise if the Issue be, whether the Land was extended in an *Elegit*, &c. this shall be tried by the *Extendors* joined with the *Assize*, 31 *Ass.* 6. *vide Roll.* tit. *Trial* 581, 582.

Of Trials *per l'Escheator*, *per Examination*, *vi-* *Escheator*,
de ib. *Sheriff.*

In an Appeal, if the Exigent be awarded, and the Party pray a Writ to inquire of the Goods and Chattels, and to seize them, this may be awarded to the *Escheator*, or *Sheriff*, at the Election of the Court, 41 *Ass.* 13. *vide hic cap.* 24, 27.

21. In Debt upon a simple Contract, De- *Wager of*
tinne, &c. the Trial may be by *Wager of Law* *Law.*
or *per Pais*, at the Defendant's Election. But when the Defendant wargeth his Law, he ought to bring with him Eleven of his Neighbours; who will avow upon their Oath, that in their Consciences he said true, so as he himself must be sworn *de fidelitate*, and the eleven *de credulitate*, *ib.* *Finch* 423. and 1 *Inst.* 295. you may read excellent Learning concerning this Trial.

22. If *Profession* be denied, it shall be tried *Profession.*
by the Court-Christian, but if the Time of the *Profession* be in Issue, this shall be tried by the Country, *lib.* 4. 71. So though an Inrolment, or other Matter of Record can- *Inrolment.*
not be tried *per Pais*, yet the Time when the Inrolment was made, may be tried *per Pais*; so whether the Party appeared in such *Appearance.*
a Court, or on such a Day, &c. shall be tried *per Pais*, *Cro.* 3 part, 131. So whether one was *Sheriff* such a Day or not, *Cro.* 1 part. 421. *Sheriff.*
Admission, *Institution*. *Plenary* and *Ability* of the *Admission,*
Parson shall be tried by the Bishop: But *Indu-* *Plenary.*
C *ation* &c.

tion shall be tried by the Country, and so shall Avoidance by Resignation, *Dyer* 229. *Moor* 61. And void or not void shall be tried *per Pais*, 1 *Inst.* 344. and *Plenary* if the Clerk be dead, *Mirror of Justice* 324. lib. 6. 49. The Cause of Refusal of a Clerk by the Bishop shall be tried by the *Metropolitan*, if the Clerk be living; but *per Pais*, if he be dead, l. 5. 58.

Per Spiritual Law.

Vi. hic cap. 16.

Ability shall be tried by the *Ordinary*, if the Clerk be alive, but if dead, then *per Pais*: Institution, Resignation, full or not full, Profession, unless alledged in a Stranger, Prior removeable at Will or perpetual, general Bastardy, the Right of Espousals, Divorce, &c. shall be tried by the *Bishops*: But in many Cases these Matters being mixed with other Circumstances, shall be tried *per Pais*.

Per Pais.

For although Institution, Resignation, &c. are Spiritual, yet Avoidance, Induction, &c. are notorious to the Country.

As if the Church be void by Resignation, or void or not void, Induction, Institution and Induction together, because the Common Law shall be preferred, Prior or not Prior.

Nota, Marriage of a Wife in Possession shall be tried *per Pais*, but not the Right of Marriage, as *ne unques accouple in loyal Matrimony*, this Right must be tried by the Bishop's Certificate, *Leon.*

Bastardy alledged in a Stranger to the Writ, or in one dead, or Abatement of the Writ, whether a Feme be a Feme Covert in Possession, &c. in Trespass by Baron and Feme, *Nient son feme* shall be tried *per Pais*. And see in *Roll. tit. Trial* 584. &c. many Cases where Bastardy, Marriage, &c. shall be tried *per Ley* Spiritual, or *per Pais*. The Time, &c. of Consecration of a Bishop, and of other Spiritual Matters, shall be tried *per Pais*. By what Spiritual Person the Trial shall be, and for what Cause, *vide ib.*

fol 53. *Leigh and Hammer's Case.*

23. An *Ideot* found so from his Nativity by *Ideot.*
Office, may come in Person in the *Chancery*,
before the *Chancellor*, and pray that before him,
and such Justices or Sages of the Law, which
he shall call to him (who are called the Coun-
sel of the King) he may be examined whether
he be an *Ideot* or no; or by his Friends he may
sue a Writ out of *Chancery*, retornable there,
to bring him into the *Chancery*, *ibid. coram no-*
bis, & concilio nostro examinand. lib. 9. 31.

24. If it be in Question, Whether the *She-Sheriff.*
riff made such a Retorn or not, it shall be
tried by the *Sheriff*: If whether the *Under-*
Sheriff made such a Retorn or not, it shall be
tried by the *Under-Sheriff*: If the Question be, *Retorna.*
Whether such a one be *Sheriff* or not, he is
made by Letters Patent of Record, and there-
fore it shall be tried by the Record, *ib.*
Cro. 1 Part, 421.

25. If an *Approver* say, That he commenced *Dures.*
his *Appeal* before the *Coroner per dures*, this shall
be tried by the Record of the *Coroner*; and if it
be found that he did it without *dures*, he shall
be hanged, *ib. Corone br. 75.*

26. The Trial, Whether a *Statute* shewed *Statute.*
before, be the true *Statute* or not, shall be by
the Examination of the *Mayor* and *Clerk* of
the *Statutes*, which took the *Statute*, and not
per Pais, *ib.* Whether a *Statute* hath two Seals
or not, shall be tried *per Pais*, *Leon. 228, 229.*

27. In *Affize*, the Tenant said, That the *Escheator.*
Lands were taken into the King's Hands, this
shall be tried by the Examination of the
Escheator.

28. If one in Avoidance of an *Outlawry*, *Certificate.*
alledge that he was in Prison at *Bordeaux*, *ul-*
tra mare in servitio majoris de Bordeaux, this
shall be tried by the *Mayor's Certificate*; and

Messenger.

in such like Cases, other Trials shall be by the Certificate of the *Marshal of the Host*, and by the *Captain of Calais*, and also by Messenger, of a Thing done beyond-sea, *ib.*

Petit Cape.

29. At the *Petit Cape*, the Tenant said, That he was imprisoned three Days before the Default, and three Days after; this shall be tried by the Examination of the Attorney.

Bailiff.

Nient Attach. per 15 Jours in Assize shall not be tried *per Pais*, but by Examination of the Bailiff, *ib.*

Almanack.

30. It seems an *Almanack* is so infallible, that it hath countervailed the Verdict of a *Jury*. For in Error of a Judgment given in *Lynne*, the Error assigned was, That the Judgment was given at a Court held there on the 16th Day of *February*, 26 *Eliz.* and that this Day was *Sunday*, and it was so found by Examination of the *Almanacks* of that Year: Upon which it was ruled, that this Examination was a sufficient Trial, and that a Trial *per Pais* was not necessary, although it were an Error in *Fact*; and so the Judgment was reversed, *Cro.* 3 part, fol. 227. 1 *Leon.* 242. the same Case, and there it was said, it was twice so ruled before.

Ordeal.

31. In ancient Times there was a Trial in Criminal Causes called *Ordalium*; for upon not guilty pleaded, the Defendant might put himself upon God and the Country (as is the Use at this Day) or else upon God only; and then if he was a Freeman, he was to be tried *per ignem*, that is, he was to pass over *Novem vomeres ignitos nudis pedibus*; and if he was not hurt by this, then he was to be acquitted, otherwise condemned; and this was called *judicium Dei*; but if he was a Slave, then his Trial was to be *per aquam*, and that
divers

divers Ways, which all appear in *Lambard, verbo Ordalium*. From which kind of Trial I presume we still retain this Expression of an innocent Person, *That he need not fear Fire or Water*: This Manner of Trial was first prohibited by the *Canons*, then by *Parliament*: The Trial by *Battel* is likewise prohibited by the *Canons*, but not by *Parliament*, as you may *Battel*. read in the *Ninth Report*, fol. 32. and in the Authorities there cited, which I therefore omit to recite here, (though I have the Books by me) and so in this whole Treatise, where I refer you to a Book, I shall not set down the Authorities cited in that Book, which will avoid Prolixity.

32. When the Matter alledg'd extendeth Which Trial. to a Place at the Common Law, and a Place shall be first. within a Franchise, it shall be tried at the Common Law, 1 *Inst.* 125. 4 *Inst.* 221.

In what Cases a Trial in one Issue shall bind Trial in one the same Party in another Issue, upon the Issue binds in same Matter. another.

In Debt against two *per several Præcipes*, if one plead a Release, and they are at Issue upon the Deed, and the other plead the same Issue, if it be found the Deed of the Plaintiff in the former Issue, this shall bind him in the second Issue. 12 *H.* 4. 8.

In Trespass, if the Defendant plead Villenage in the Plaintiff, if this be found against the Defendant, this shall bind him in the same Issue, in another Action in the same Court betwixt the same Parties, 44 *Aff.* 5.

If a Man be found guilty of a Conspiracy upon an Indictment at the King's Suit, this shall not bind in a Writ of Conspiracy at the Suit of the Party, but he may plead not guilty, 27 *Aff.* 13.

If a Man upon an Indictment of Extortion, confess it, and put himself in the King's Grace, and makes Fine, &c. this shall bind him, and he shall not plead not guilty to the Suit of the Party; for a Confession is stronger than a Verdict, 27 *Aff.* 57. *per Sharde. Vide Roll. tit. Trial* 625.

In what Cases
Trial against
one shall be
against o-
thers.

He which is not Party to the Issue, nor can have Attaint, or challenge the Inquest, shall not be bound by the Trial, 11 *H. 4.* 30.

And therefore in Trespass against two, and one pleads a Release, and the other justifies as his Servant; if the Issue be found against the Master, it shall not conclude the Servant, 11 *H. 4.* 30. *Roll. ib.* 625.

At what
Time the
Trial shall be.

One shall not be compelled to try a Traverse the same Sessions he makes it; for a Man shall have Time to make his Defence, and is not supposed to be ready to answer sudden Objections; and for this Reason many Judgments upon Indictments have been reversed.

Justices of Oyer and Terminer, nor Justices of Peace, cannot inquire and determine the same Day: But Justices of Goal Delivery and Justices in Eyre may.

Justices of Peace cannot proceed to the Delivery of a Person indicted of Felony before them the same Day he is arraigned, 22 *E. 4.* *Coron.* 44. Declared by all the Justices of England, to be observed as a Law.

In an Indictment in *B. R.* or in the same County, and removed thither, the Defendant may be arraigned and tried the same Day. For the King's Bench is a Court of Eyre for all Offences in that County: Otherwise of an Indictment removed out of another County, *Vide Roll. tit. Trial* 626, many Cases *de ceo.*

Ch. 2. *several Sorts of Trials thereof.*

23

33. All Matters done out of the Realm of *England*, concerning War, Combat or Deeds of Arms, shall be tried and determined before the Constable and Marshal of *England*, before whom the Trial is by Witnesses, or by Combat, and their Proceeding is according to the Civil Law, and not by the Oath of twelve Men, 1 *Inst.* 74. 261. Wherefore if the King's Subject be killed by another of his Subjects in any foreign Country, the Wife or Heir of the Dead, may have an Appeal before the Constable and Marshal, who sentence upon the Testimony of Witnesses or Combat, *ib.* So if a Man be wounded in *France*, and die thereof in *England*, *ib.* 4 *Inst.* 140.

Marshal Affairs.

Witnesses or Combat.

It is worthy our Observation, to take Notice when there are several Issues, which of them shall be first tried; and for this you have already heard, That where Issue is joined for Part, and a Demurrer for the Residue, the Court may direct the Trial of the Issue, or judge the Demurrer first, at their Pleasure; though by the Opinion of *Dodderidge*, it is the best Way to give Judgment upon the Demurrer first, because when the Issue comes afterwards to be tried, the Jury may assess Damages for the whole.

What Issue shall be first tried.

La. ch 4.

Damages.

A *Scire facias* was brought upon a *Recognizance in Chancery*, the *Ter-tenants* pleaded several Pleas, the Plaintiff demurred to one, and took Issue on the other, the Record was sent into *B. R.* to try the Issue, and it was tried, and *Verdict pro Plaintiff*, the Demurrer not being argued; and it was adjudged *per B. R.* that Judgment ought to be given on both by that Court, *Jeffreyson* and *Dawson's Case*, *Hill.* 21, 22 *Car.* 2. *B. R.* *Vide* for these Things, 1 *Roll. Abr.* 534, 535. *Roll. Rep.* 287.

C 4

and

and in the principal Case, 4 *Inst.* 80. was denied to be Law.

Immaterial Issue.

An immaterial Issue joined, which will not bring the Matter in Question to be tried, is not helped after Verdict by the Statute of *Jeofails*, but there must be a Repleader; because this is Matter of Substance; for if there were no Issue, there could be no Verdict, and so it is as if nothing had been done in the Cause.

Plea to the Writ.

In an Action against two, the one pleads in Abatement of the Writ, the other to the Action, the Plea to the Writ shall be first tried; for if that be found, all the whole Writ shall abate, and make an end of the Business; for the Plaintiff ought not to recover upon a false Writ, 1 *Inst.* 125.

Plea to the whole first tried.

In a Plea Personal against divers Defendants, the one Defendant pleads in Bar to Parcel, or which extendeth only to him that pleadeth it; and the other pleads a Plea which goeth to the whole: The Plea that goeth to the whole, (that is) to both Defendants shall be first tried, because the other Defendant shall have Advantage thereof; for in a Personal Action, the Discharge of one is the Discharge of both.

Release.

Roll. rit. Trial 628.

As for Example, If one of the Defendant's in Trespass pleads a Release to himself, (which in Law extends to both) and the other pleads not guilty which extends but to himself; or if one pleads a Plea which excuseth himself only, and the other pleads another Plea which goeth to the whole, the Plea which goeth to the whole shall be first tried; for if that be found, it maketh an end of all: And the other Defendant shall take Advantage hereof, because the Discharge of one

Discharge of one discharge both.

is

is the Discharge of both. But in a Plea real it is otherwise, for every Tenant may lose his Part of the Land ; as if a *Præcipe* be brought as Heir to his Father against two, and one pleads a Plea which extendeth but to himself, and the other pleads a Plea which extends to both, as Bastardy in the Demandant, and it is found for him, yet the other Issue shall be tried ; for he shall not take Advantage of the Plea of the other, because one Jointenant may lose his Part by his Misplea.

Brown and Staundford Justices consulted with Grammarians in Things of Grammar ; and *Hulls* a Batchelor of Law (*tempore H. 6.*) was called into Court to shew the Difference between precise and causative Compulsion, *Vide Plow. 122, 127, 128.*

Pasch. 16 Car. 2. B. R. An Action of *Trover, &c.* was brought *de sex Capitalibus fibulatis, Anglice, six laced Coifs* ; after Verdict for the Plaintiff, it was moved in Arrest of Judgment, that the *Latin* Words were both Adjective, and so not certain : But it was answered, That *Capital* is a Substantive, and the *Nomenclator* of *Westminster-School* was produced to warrant it, and it was adjudged for the Plaintiff accordingly, and the Court allowed that Authority before *Rider's Dictionary.*

Henley and Burstal ; In the pleading and joining of the Issue, the Defendant's Christian Name was mistaken ; and resolved by the Court, that it might be amended, it being right before in the Record, *1 Ventr. 25.*

A Bill was exhibited in *Chancery*, complaining that a Verdict in *Replevin* had been unduly obtain'd ; and it was decreed that there should be a new Trial, the Complainant paying the Costs of the former : This could not have

Christian
Name a-
mended.

New Trial
directed by
the Court of
Chancery in
Replevin.

have been tried again at Law, because the Verdict in *Replevin* is conclusive, 2 Vent. 35.

Juror producing a Court-Roll to his Companions, Cause for a new Trial.

Goodman versus *Cotherington*; the Jury being charged with an Issue and departed from the Bar; one of them went from their Companions and fetched a Court-Roll, which induced the Jury to find for the Plaintiff; and it was held to be a good Cause for a new Trial: But *Twisden* said, that in Case of such a Miscarriage in *Pais*, no Notice should be taken of it on Affidavits, unless it were indorsed on the *Posse*, 1 *Siderfin* 235.

A Term's Notice required, where the Cause has been a Year at Issue.

Throgmorton's Case; where an Issue is joined and a Year passes, the Plaintiff cannot bring the Cause to Trial without giving a Term's Notice. *Per Cur.* If Notice were given the Term before, and they did not proceed that Term, but the next, then fourteen Days Notice is sufficient; and if after a Year is lapsed, the Defendant will try the Issue by Proviso, a Term's Notice is not necessary, for that the Plaintiff ought to be at all Times ready to try it, 1 *Siderfin* 34.

Not so where the Defendant tries it by Proviso.

Need not give a Year's Notice where the Defendant occasions the Delay by his Privilege, &c.

Sir Hugh Povey's Case; the Court held, That since the Defendant by his Privilege of Parliament, had delayed the Plaintiff above a Year after Issue joined, the Plaintiff should not be obliged to give him a Term's Notice of Trial, any more than where a Defendant stays the Proceedings by an Injunction obtained out of *Chancery*, *ibid.* 92.

Notice for a Prisoner left with a Turnkey eight Days before the Trial, sufficient.

Rex versus *Baron*; it was held, That Notice of Trial left with a Turnkey of the *Marshalsea*, eight Days before the Trial was good Notice, as well in Criminal Cases as Civil, *Sid.* 231.

Where

Where Issue is joined upon an Indictment of Perjury, and the Prosecutor does not try it, the Party indicted may try it by Proviso, 1 Sid. 317.

Defendant in Indictment of Perjury, may try it by Proviso.

Read versus Dawson; in an Information of Perjury, it was found for the King, and moved upon several Affidavits to have a new Trial. The Court were of Opinion, That they had not Power to grant a new Trial, without Consent of the Counsel for the King, although to them there appeared sufficient Cause for a new Trial: But they agreed, that in Debt by an Informer, the Court might grant a new Trial upon Cause shewn without Consent of the Counsel, because there the Party had Interest, 1 Sid. 49.

Where a new Trial may be granted, and where not.

Wheeler versus Honour; it was there held, That a new Trial ought not to be granted after a Trial at Bar, but upon great Cause; and it was said, there were not above two Instances to be met with, where a new Trial had been granted upon a Motion after a Trial at Bar, Sid. 58.

If Matter of Fact and Matter of Record are so intermixed that they cannot be divided, the whole shall be tried by the Country, Sid. 314.

Fact mixed with Matter of Record, to be tried per Pais.

Watson versus Baker; if an Issue be, whether a Church be void or not void, this shall be tried by the Country; but if the Issue be, whether the Church is full or not full, it shall be tried by Certificate: So if the Issue be, whether such a Feme be Covert or Sole, this shall be tried by the Country; but if *unique* Loyal Matrimony, it shall be tried by Certificate. And the Reason of those Cases is, that void or not void, Covert or Sole, are Things notorious to the Country, and distinguishable

Avoidance and Plenary, how to be tried.

Covert or Sole per Pais.

Loyal Matrimony per Certificate.

The Reason.

guishable by them ; but Plenarty or Loyal Matrimony are not within their Conusance, and therefore not triable by them ; for Plenarty is by Institution, and Loyal Matrimony ought to be agreeable to the Laws established in that Case, of which the Country are not Judges, *Sid.* 390.

Breach of Covenant assigned in another County, Mis-trial.

Gilbert versus Martin ; an Action of Covenant was brought in *Hampshire*, and a Breach assigned for not repairing a House in *Berkshire*, and Issue joined upon *non infregit Conventionem*. And a Verdict for the Plaintiff in *Hampshire*: Mov'd in Arrest of Judgment, that this was a Mis-trial, and of that Opinion was the Court, *Sid.* 157.

View after the Jury appear.

Bulstrode versus Hall and Stevens ; the View was granted in a Trial at Bar, after the Jury had appeared and heard Part of the Evidence, *Sid.* 148.

No new Trial after Acquittal.

Rex versus Davis & al. An Information for an Assault and Riot was tried at the Assizes for *Devon*, and a Verdict for the Defendants that they were not guilty. And on a Motion for a new Trial upon Affidavits of the Fact, and that the Judges Directions were to find Assault, it was denied, for the Court said, there could be no Precedent shewn for it in Case of Acquittal, *Shower* 316.

Trial by two Witnesses.

Where a Trial is not by Jury but *per Testes*, there must be two in all Cases, *Shower*, 161.

Every Defendant in Trespass, &c. to have full Costs.

Where several Persons are made Defendants to any Action of Trespass, Assault, False Imprisonment or *Ejectione firmæ*, and any one or more shall upon Trial be acquitted by Verdict, every Person so acquitted shall recover his Costs of Suit, unless the Judge shall immediately after the Trial in open Court, certify upon the Record, that there was a reasonable

nable Cause for the making of such Person or Persons, Defendant or Defendants to such Action, *Stat. 8 & 9 W. 3. cap. 11.*

In all Actions of Trespas to be commenced in any Court of Record at *Westminster*, where it shall appear at the Trial, and be certified by the Judge on the Back of the Record, that the Trespas was wilful and malicious, the Plaintiff shall recover not only his Damages, but Costs of Suit, *ibid.*

Full Costs to the Plaintiff where the Trespas is certified to be wilful.

In all Actions prosecuted in any Courts of Record, upon any Bond or Penal Bill for Non-performance of Covenants, the Plaintiff may assign as many Breaches as he shall think fit, and the Jury at the Trial shall assess Damages for such of the Breaches so assigned, as the Plaintiff at the Trial shall prove broken; and the like Judgment shall be entred on such Verdict, as hath been usually done in such Actions; such Judgment shall also stand as a further Security, to answer the Plaintiff such Damages as he may sustain for further Breach of any Covenant contained in the same Deed or Writing, *ibid.*

In Action of Covenant, the Plaintiff to assign as many Breaches as he shall think fit.

The Judgment shall remain as a Security for any future Breach.

Upon Demurrer joined in any Court of Record, the Judges shall give Judgment as the Right and Matter in Law shall appear without regarding any Imperfection, or Defect in any Writ, Return, Pleading or Process, except those which the Party demurring shall set down as Causes of his Demurrer, notwithstanding such Imperfection or Defect have been taken to be Matter of Substance, and not aided by 27 *Eliz. cap. 5.* so as sufficient Matter may appear, upon which the Court may give Judgment, and no Exception shall be taken for an immaterial Traverse, Default of entring Pledges upon Bill or Declaration,

On Demurrer no Defects to be taken Notice of, but such as are set down as Causes of Demurrer.

or not alledging the bringing into Court any Deed mentioned in the Pleadings, Letters Testamentary, or Administration; for Omission of *Vi & armis & contra pacem*, or either of them, or *hoc parat. est verificare*, for *parat. est verificare per Recordum*, or *prout patet per Recordum*; but the Court shall give Judgment without regarding such Imperfections or Defects, or other Matter of like Nature except shew'd for Cause, 4 & 5 A. cap. 16.

Rex versus Bear, Hill. 10 W. 3. B. R. Indictment for Composing, Writing, Making and Collecting several Libels, resolv'd that the whole Libel need not be set forth in the Indictment, but if any Part qualifies the rest, it may be given in Evidence, *Salkeld* 417.

If a Libel be publickly known, having a written Copy of it is an Evidence of a Publication, but otherwise where is it not known to be published, *ibid.*

Death of Defendant before the Commission-Day, not aided by the Statute; but if after Commission-Day. it is.

Mich. 6 A. B. R. Ejectment laid in Devonshire to be tried at Exeter, the Defendant died the Day before the Assizes began at Exeter; and upon a Trial on full Evidence, Verdict *pro Quer.* and Motion in Arrest of Judgment. *Et per Cur.* First, the Death of either Party before the Assizes is not remedied by the Statute, but if the Party dies after the Assizes begins, though the Trial be after his Death, that is, within the Remedy of the Statute, for the Assizes is but one Day in Law, and this is a Remedial Law, and shall be construed favourably. 2. The Court held, That in this Case it was in their Discretion, whether they would upon Motion arrest Judgment, or put the Party to a Writ of Error; accordingly they refused to arrest the Judgment, and the Party was put to his Writ of Error, that the Point

Point might be put in Issue and tried by a Jury, *Salkeld* 8.

Duke's Case, Mich. 9 W. 3. B. R. Duke was Judgment for upon a Trial at Bar convicted of Perjury, a corporal Punishment cannot be given against one in his Absence. *Et per Holt Ch. J.* Judgment cannot be given against any Man in his Absence for a corporal Punishment, there is no such Precedent. If a Man be outlawed of Felony, Execution was never awarded against the Felon till brought to the Bar. A *Capias ad Satisfaciendum Domino Regi pro fine*, is common, but there never was a Writ to take a Man and put him in the Pillory; and so says Sir Samuel Astry upon Search of Precedents, *Salkeld* 400.

Duke of Norfolk's Case, Trin. 1 A. B. R. A Judgment Verdict was given in *Easter Term*, and before Judgment signed the Plaintiff died. *Et per Holt, Ch. J.* That shall not hinder the Judgment being enter'd, provided it be within two Terms after; and the Statute of Frauds and Perjuries only requires the Time of signing, should be enter'd upon the Roll, and this is only for the Benefit of Purchasers; for if Judgment be signed in the Vacation, yet 'tis enter'd as of a Term before, and none but a Purchaser shall be admitted to say, it was signed as of any other Time; and it is the Course of the Court, to let all Things be done in the Vacation as of the Term before, *Salkeld* 401.

By the 8 & 9 W. 3. Cap. 11. Intituled an Act Full Costs in Trespass, &c. for the better preventing frivolous and vexatious Suits, it was enacted, That where several Defendants acquitted upon any Action Trial.

Unless the
Judge cer-
tifie.

Costs upon a
Demurrer.

Costs on a
Writ of
Error.

Costs in Debt
for not set-
ting out
Tithes.

‘ Action of Trespass, Assault, False Imprison-
‘ ment, or *Ejectione firmæ*, and any one or more
‘ shall upon Trial be acquitted by Verdict;
‘ every Person so acquitted shall recover his
‘ Costs of Suit, unless the Judge shall imme-
‘ diately after the Trial in open Court, cer-
‘ tifie upon the Record that there was a rea-
‘ sonable Cause, for making such Person or
‘ Persons a Defendant or Defendants to such
‘ Action.

‘ And that if any Person shall commence
‘ in any Court of Record any Action or Suit,
‘ wherein upon Demurrer Judgment shall be
‘ given against the Plaintiff or Defendant;
‘ or if at any Time after Judgment given for
‘ the Defendant, the Plaintiff shall sue a
‘ Writ of Error, and the said Judgment shall
‘ be affirmed, or the said Writ discontinued,
‘ or the Plaintiff nonsuit therein, the De-
‘ fendant shall have Judgment to recover his
‘ Costs against such Plaintiff, and Execution
‘ by *Capias ad satisfaciendum*, *Fieri facias* or
‘ *Elegit*.

‘ That in all Actions of Waste and Debt,
‘ upon the Statute for not setting forth of
‘ Tithes, where the Damage found by the
‘ Jury shall not exceed twenty Nobles; and
‘ in all Suits upon Writs of *Scire facias*; and
‘ upon Prohibitions, the Plaintiff, obtaining
‘ Judgment, or Award of Execution after
‘ Plea pleaded, or Demurrer joined therein,
‘ shall likewise recover his Costs of Suit; and
‘ if the Plaintiff become nonsuit or discon-
‘ tinue, or a Verdict pass against him, the
‘ Defendant shall have Costs and Execution
‘ for the same.

‘ That

‘ That in all Actions of Trespafs com-
 ‘ menc’d in any Court of Record, where it
 ‘ shall appear at the Trial, and be certified by
 ‘ the Judge on the Back of the Record, That
 ‘ the Trespafs was wilful and malicious, the
 ‘ Plaintiff shall recover not only his Damages,
 ‘ but full Costs of Suit.

Wilful Tref-
 pafs, full
 Costs.

‘ Provided nothing herein contained shall
 ‘ alter the Laws in being as to Executors, and
 ‘ Administrators, in such Cases where they
 ‘ are not at present liable to pay Costs of Suit

Not extended
 to Executors,
 and Admini-
 strators.

‘ That in all Actions to be commenced in
 ‘ any Court of Record, if the Plaintiff die
 ‘ after an interlocutory Judgment, and before
 ‘ a final Judgment, the said Action shall not
 ‘ abate, if the said Action might be originally
 ‘ prosecuted by his Executors or Administra-
 ‘ tors; and if the Defendant die after such
 ‘ interlocutory Judgment, and before a final
 ‘ Judgment, the Action shall not abate,

Plaintiff or
 Defendant
 dying after
 an interlocu-
 tory Judg-
 ment, and
 before a final
 Judgment,
 the Action
 shall not a-
 bate.

‘ if such Action might be originally pro-
 ‘ secuted against his Executors or Admini-
 ‘ strators; and the Executors or Administra-
 ‘ tors of such Plaintiff, after such interlocu-
 ‘ tory Judgment, may have a *Scire facias* a-
 ‘ gainst the Defendant if living; or if dead,
 ‘ against his Executors or Administrators, to
 ‘ shew Cause why Damages should not be as-
 ‘ sessed and recovered against him or them;
 ‘ and if he or they do not appear at the Re-
 ‘ turn, and shew sufficient Cause to arrest the
 ‘ final Judgment, or being returned warned,
 ‘ or upon two Writs of *Scire facias*, it being
 ‘ returned that the Defendant had nothing
 ‘ whereby to be summoned, or could not be
 ‘ found, a Writ of Inquiry of Damages shall
 ‘ be awarded, which being executed and re-

D

‘ turned

Death of one
of the Plain-
tiffs or De-
fendants
where is
more than
one, shall not
abate the
Action.

Plaintiff in
Debt on
Bond, &c. for
Non-perfor-
mance of
Covenants, to
assign as ma-
ny Breaches
as he thinks
fit.

And the Jury
may assess
Damages ac-
cordingly.

Defendant
paying Da-
mages and
Costs assessed,
Execution to
be stay'd.

turned, Judgment final shall be given for the Plaintiff, his Executors or Administrators.

If there be two or more Plaintiffs or Defendants, and one die, if the Cause of Action survive to the surviving Plaintiff, or against the surviving Defendant, the Writ or Action shall not abate; but such Death being suggested upon the Record, the Action shall proceed.

That in all Actions prosecuted in any Court of Record, upon any Bond or penal Sum for Non-performance of Covenants, the Plaintiff may assign as many Breaches as he shall think fit; and the Jury at the Trial shall and may assess Damages for such of the said Breaches so assigned, as the Plaintiff at the Trial shall prove broken, and the like Judgment shall be entred on such Verdict as hath been usually done in such Actions. And if Judgment be given for the Plaintiff, upon Demurrer, Confession or *nihil dicit*, the Plaintiff upon the Roll may suggest as many Breaches as he shall think fit, upon which shall issue a Writ to summon a Jury to appear at the Assizes of that respective County, to inquire of the Truth of every one of those Breaches, and to assess Damages accordingly: And the Justices of Assize shall make Return thereof to the Court from whence the same issued; In Case the Defendant after such Judgment entred, and before such Execution executed, shall pay into Court such Damages so assessed, and Costs of Suit, a Stay of Execution shall be entred of Record; or if by Reason of Execution executed, the Plaintiff or his Executors or Administrators, shall be fully paid all such Damages, together with

' with his Coſts and reaſonable Charges, the
 ' Body, Lands, and Goods of the Defendant
 ' ſhall be forthwith diſcharged, and the Satiſ-
 ' faction entred upon Record: Yet ſhall ſuch
 ' Judgment ſtand and be as a farther Security
 ' to answer the Plaintiff, his Executors, &c.
 ' ſuch Damages as ſhall or may be ſuſtained,
 ' for farther Breach of any Covenant in the
 ' ſame Deed or Writing contained, upon which
 ' the Plaintiff, &c. may have a *Scire facias* up-
 ' on the ſaid Judgment againſt the Defendant,
 ' his Heir, Ter-tenants, Executors, or Admi-
 ' niſtrators, ſuggeſting other Breaches, and to
 ' ſummon them to ſhew Cauſe, why Execu-
 ' tion ſhall not be awarded upon the ſaid
 ' Judgment; upon which there ſhall be the
 ' like Proceedings as aforeſaid: And upon
 ' Payment of Damages and Coſts, Proceed-
 ' ings to be again ſtay'd, and ſo *toties quoties*,
 ' and the Defendant diſcharged out of Exe-
 ' cution.

But the Judge-
 ment to ſtand
 as a Security
 againſt far-
 ther Breaches.

Whereupon
 the Plaintiff
 may have
 a *Scire facias*.

By 4 & 5 Ann. c. 16. entitled, *An Act for the
 Amendment of the Law, and the better Advance-
 ment of Juſtice*, it was enacted, ' That upon

' Demurrer joined in any Court of Record,
 ' the Judges ſhall give Judgment as the
 ' Right and Matter in Law ſhall appear, with-
 ' out regarding any Imperfection or Defect
 ' in any Writ, Return, Pleading or Proceſs,
 ' except thoſe which the Party demurring
 ' ſhall ſet down as Cauſes of his Demurrer,
 ' notwithstanding ſuch Imperfection or De-
 ' fect, have been taken to be Matter of Sub-
 ' ſtance, and not aided by 27 Eliz. c. 5. ſo as
 ' ſufficient Matter may appear upon which
 ' the Court may give Judgment. And no Ex-
 ' ception ſhall be taken for an immaterial
 ' Traverſe, Default of Entering, Pledges upon

On demurrer
 no Imperfe-
 ctions to be
 regarded, but
 ſuch as are
 ſet down as
 Cauſes of
 Demurrer.

Several Mat-
ters may be
pleaded with
Leave of the
Court.

If such Mat-
ter be insuffi-
cient, full
Costs.

No dilatory
Plea to be re-
ceived.

Where Pay-
ment may be
pleaded in
Debt.

Condition of
a Bond satisfi-
fied, Pay-
ment may be
pleaded.

Defendant
discharged on
bringing in
Principal, In-
terest and
Costs.

‘ Bill or Declaration, or not alledging the
‘ bringing into Court any Deed mentioned in
‘ the Pleading, Letters Testamentary, or of
‘ Administration, for Omission of *Vi & armis*
‘ & *contra Pacem*, or either of them, or *hoc*
‘ *parat. est verificare*, for *parat. est verificare per*
‘ *Recordum*, or *prout patet per Recordum*: But the
‘ Court shall give Judgment without regarding
‘ such Imperfections or Defects, or other Mat-
‘ ter of like Nature, except shewed for Cause.

‘ That the Defendant or Tenant, or Plain-
‘ tiff in *Replevin* in any Court of Record,
‘ with Leave may plead as many several Mat-
‘ ters as are necessary.

‘ Proviso, If any such Matter on Demurrer
‘ be judged insufficient, Costs shall be given
‘ at the Discretion of the Court: Or if a Ver-
‘ dict be found on any such Issue for the
‘ Plaintiff or Demandant, Costs shall be gi-
‘ ven in like Manner; unless the Judge certifie
‘ that the Defendant, Tenant, or Plaintiff in
‘ *Replevin* had a probable Cause to plead it.

‘ That no dilatory Plea shall be received in
‘ any Court of Record, unless the Truth
‘ thereof be proved by *Affidavit*, or some
‘ probable Matter shewn.

‘ In Debt on a single Bill, Debt, or *Scire*
‘ *facias* upon a Judgment, the Defendant may
‘ plead Payment in Bar. In Debt upon a
‘ Bond, if the Defendant, before Action
‘ brought, hath paid the Principal and Inte-
‘ rest due by the Deseazance or Condition,
‘ he may plead Payment in Bar.

‘ Pending an Action on such Bond, Defen-
‘ dant may bring in Principal, Interest and
‘ Costs in Law and Equity, and then the
‘ Court shall give Judgment to discharge the
‘ Defendant.

Lazier

Lazier versus Dyer, Mich. 2 A. B. R. Issue being joined and entred as of *Trinity Term*, the Plaintiff rested till the *Trinity Term* following, and then gave Notice of Trial after the Term; and a *Venire facias* and *Distringas* was taken out in the Vacation, but tested and entred as of the Term.

If there be no Proceeding in Fact within four Terms, there must be a Term's Notice of Trial.

Per Cur. This is not sufficient Notice; for though in Law this was a Proceeding within the Term; yet in Fact it was a Proceeding in Vacation, and therefore there was not a Term's Notice of Trial, *Salk.* 457.

Dom. Rex versus Edwards, Hill. 8 W. 3. B. R. *Per Cur.* The King shall pay Costs for an Amendment, but shall not pay Costs for not going on to Trial: But where there is a Prosecutor, he shall pay Costs for Amendments, and for not going on to Trial both, *Salkeld* 193.

Crown pays Costs for Amendments, but not for not going on to Trial.

Anonymous, Mich. 13 W. 3. B. R. If there be a Demurrer to Part, and an Issue upon the other Part, and Judgment be given for the Plaintiff upon the Demurrer, he may enter a *Non Pros.* as to the Issue, and proceed to a Writ of Enquiry on the Demurrer; but without a *Non Pros.* he cannot have a Writ of Inquiry, because on the Trial of the Issue, the same Jury will ascertain the Damages for that Part to which the Demurrer was. *Per Cur.* *Salk.* 219.

Demurrer to Part, and Issue to other Part.

Watson versus Sutton; a new Trial will not be granted for Matter omitted to be insisted on at a former Trial, *Salkeld* 273.

Where a new Trial will not be granted.

C H A P. III.

Of a Venire Facias; to whom it shall be directed; when to the Sheriff, when to the Coroners, when to Essofors, and when to Bailiffs; when well awarded, &c.

HAVING given you the Epitome of what Trials are allowed by the Common Law, and what shall be tried *per Pais*, and what not, we shall now apply our selves more particularly to the Trial by Juries : And because a *Venire facias* is the Foundation and *Causa sine qua non* of a Jury, (I mean in Civil Causes; for in Criminal, as upon Indictments, the Justices of Gaol-Delivery give a general Command to the Sheriff, to cause the Country to come against their Coming, and take the Panels of the Sheriff, without any Process directed to him, yet Process may be made against the Jury, though it is not much used. *Staundford Plees del Corone* 155.) I will first recite the Writ *in terminis*, the rather because I intend to order my Discourse according to the Method of the Writ.

Venire facias. *Rex, &c. Vic. B. Salutem. Præcipimus tibi quod venire facias coram Justiciariis nostris de Banco apud Westm. tali die, duodecim liberos & legales homines de vicinet. de C. quorum quilibet habeat quatuor libras terræ, tenement. vel reddit. per annum ad minus, per quos rei veritas melius sciri poterit; & qui nec D. E. nec F. G. aliqua affinitate attingunt; ad faciend. quandam Jur. patriæ*
inter

inter partes prædict. de placito, &c. quia tam idem D. quam prædict. F. inter quos inde contentio est, posuer. se in Fur. illam. Et habeas ibi nomina Fur. illorum & hoc breve. T. &c.

This is one of those *Latin Letters*, (as *Finch* terms them, *f. 237.*) which the King sends with Salutation to the Sheriff; but withal commands him, that he cause to come twelve free and lawful Men of his County, to resolve the Question of the Fact in dispute between the Parties upon the Issue; and it is a judicial Writ, issuing out of the Record, for Plaintiff or Defendant, after they have put themselves upon the Country: For upon the Words *Et de hoc ponit se super patriam*, by the Defendant, or, *Et hoc petit quod inquiretur per patriam*, by the Plaintiff, and issue joined thereupon, the Court awardeth the *Venire facias*, viz. *Ideo fiat inde Furat.*

Ideo venit inde Furat. is Error in inferior Courts, for it ought to be *Ideo præcept. est vic. quod ven. fac, &c Siderfin 364.* and it should be *de visneto de C. specially, Keble 2 Part, 350.*

And if they come not at the Day of the Writ returned, then shall go forth against them an *Habeas Corpora* and *Distingas*, to bring them in to try the Matter. The which two last Writs are usually made with this Clause, *Nisi prius Justiciarii venerint, &c.* and are returnable after the Time of the Judges coming their Circuit.

And first, you see it is directed *Vicecomiti, Sheriff. i. e.* to one who is *Vicecomes*, and hath the Regimen of the County instead of the Earl of that County, to whom once it did belong; as we are taught in the *Mirror, cap. 1. sect. 3. scil.* That it appeareth by the Ordinance of an-

cient Kings before the Conquest, that the Earls of the Counties had the Custody or Guard of the Counties. And when the Earls left their Custody or Guards, then was the Custody of Counties committed to Viscounts, who therefore are called *Vicecomites*.

What Trust
in the Sher-
riff.

What great Repose and Trust both the King and Laws put in this great Officer, the Oracle tells you, 1 *Inst.* 168. That he is Sheriff, that is, *Præfectus Comitatus*, Governor of the County; for the Words of his Patent be, *Commisimus vobis Custodiam Comitatus nostri de. &c.* And he had a threefold Custody, *triplicem Custodiam*, viz. first, *Vita Justitiæ*, for no Suit begins, and no Process is served but by the Sheriff. And he is to return indifferent Juries for the Trial of Mens Lives, Liberties, Lands, Goods, &c. Secondly, *Vita Legis*, he is after long Suits and chargeable, to make Execution, which is the Life and Soul of the Law, Thirdly, *Vita Reipublicæ*, he is *Principalis Conservator pacis* within the County, which is the Life of the Commonwealth, for *Vita Reipublicæ Pax*.

To whom the
Venire facias
ought to be
directed.

Coroners.

Yet notwithstanding the Height and Latitude of this great Officer's Power and Trust, the Law adjudges him in many Cases not capable to do so much as return a Jury; for if he be of Kindred by Nature, or of Affinity by Marriage, to any of the Parties, or (that I may say all in a little) if he be not as indifferent almost in all Respects as he is, whom the Law allows to be a Juror, he ought not to meddle with the returning of the Jury; but the *Venire facias* shall be directed to the Coroners (or to some of them, if the Residue are not indifferent) who in that Case are *hæc vice Vicecom.* And if the Coroners are not indifferent,

ferent, then the *Venire* shall be directed *ad Fortescue,*
 2 *Electores*, that is, to two whom the Court *cap. 2. 5.*
 shall chuse and deem fit to return the Jury;
 and to the Return of these *Ellisors* or *Esisors*, *Ellisors.*
ab Eligendo, no Challenge will be admitted,
Bro. tit. Venire facias 14. as to the Array, but
 to the Polls, 1 *Inst.* 158. If one of the She- *Challenge.*
 riffs of London be a Party, then the *Venire* *Sheriff of*
 may be directed to the other Sheriff; if the *London.*
 Under-Sheriff be a Party, yet the *Venire* may *Of London or*
 be directed to the Sheriff, with this Proviso, *of any Place,*
Quod Sub-Vic. tuus in nullo se intromittat cum exe- *where two*
cutione istius brevis, 18 E. 4. 3. *Persons make*
one Sheriff.

Judicial Writs (say Coke and Saunders, *Pla.* 74.) *Suggestion.*
 may be directed to the Coroners, as the *Ve-*
nire facias, where the Parties are at Issue;
 there, upon the Surmise of the Plaintiff, that *Of whom.*
 the Sheriff is his Cousin, and upon Prayer
 that the *Venire* be directed to the Coroners, *Coroners.*
 for Avoidance of his own Delay that might
 happen by the Challenge of the Array, the
 Defendant shall be examined whether it be *So in Eject-*
 true or not; and if he confess it, then the *ment against*
venire shall be awarded to the Coroners; for *four, upon*
 then it appears to the Court by the Defen- *Affinity of*
 dant's Confession, that the Sheriff is not in- *the Sheriff to*
 different; but if the Defendant denies it, then *one of the*
 the Process shall be awarded to the Sheriff, *Defendants.*
 because the Sheriff's Authority and Profit shall *Roll. tit.*
 not be taken away, without Cause apparent *Trial 668.*
 to the Court; but if the Defendant will al- *Examination.*
 ledge any such Matter, and pray a *Venire fa-*
cias to the Coroners, there the Plaintiff shall *Not of the*
 not be examined, neither shall such Allega- *Defendant's*
 tions be allowed, because Delays are for the *Suggestion.*
 Defendant's Advantage, and the Defendant *The Defen-*
 may challenge the Jury for this Cause, and so *dant may not*
 is at no Prejudice. *have a Venire*
facias to the
Coroners.

And

Language a good
cause of Challenge
the in y^e ninth
Degree No. low.
425. Vernon 17
Manners

And see in *Term. Hill. 3 H. 7. f. 5. placit.* ult. in a *Quare impedit*, where the Defendant shewed how the Sheriff was Cousin to the Plaintiff, and prayed a Writ to the Coroners, but it was denied him upon the same Reason, *Fitz. tit. Suggestion, placit. 8: Br. Challenge 153.*

In the Lord *Brook's Case*, *Trin. 1657. B R.* In Ejectment, the Court was moved that the Lord *Brooks* might be made Ejector, which was granted; then the Court was informed that the Lessor of the Plaintiff was High Sheriff of the County, and that the Coroner was Under Sheriff, and it was pray'd that *Elisors* might return the *Fury*; but the Court would not grant it at the Prayer of the Defendant, though the Plaintiff offered to agree to it, it being in a Trial by *Nisi prius*; but had it been in a Trial at Bar, they would have granted it. But the regular Course is for the Plaintiff to pray it, or else the Defendant may challenge the Array at the *Affizes*; for it is a principal Challenge, that the Lessor of the Plaintiff is High Sheriff, or of Kindred to the Sheriff, for which see *Hutt. 25. Moor 470. Roll. Rep. 328.* And it was so adjudged, *Trin. 15 Car. 2. B R. Duncomb and Ingleby*, that it is a principal Challenge.

For what
Causes Pro-
cess, shall be
directed to
the Coroners.

In Ejectment, the Plaintiff suggested, That he and one of the Coroners were all of the Liberty *del Countee Wigorn'*, and prayed a *Venire facias* to the other Coroner; although this is no principal Challenge, and the Defendant might have opposed the Prayer, yet because he confessed it, the Award was well to the Coroner. So if the Cause be, that one of the Coroners be retained of Counsel with the Plaintiff; if the Suggestion do not com-
prehend

prehend a principal Challenge, but only of Favour, this is not sufficient to award Process to the Coroners: But if it be a principal Challenge, as Affinity, &c. if the Defendant confess it, the Award shall be to the Coroners; if he will not confess it, then to the Sheriff; and in such Case the Defendant shall never challenge the Array for that Cause: So if the Plaintiff pray Process to the Coroners for Favour in the Sheriff, if the Defendant say that this is not favourable, he shall never challenge for Favour, unless *de puisne temps*.

If the Array be quashed because made by the Sheriff's Minister, who was aiding and of Counsel with one of the Parties, yet the Writ shall not be directed to the Coroners, but to the Sheriff, commanding him to make the Pannel by another Officer; as, *ita quod* the Sheriff *ne se intromittat*, &c.

Note, The Sheriff may appoint a general Officer in a Court, and his Return shall be good, *Keble* 1 Part, 357.

If the *Tales* be quashed for Affinity in the Sheriff, but not the principal Pannel, because 'twas made before the Affinity, yet all shall be awarded to the Coroners, *scil.* the *Distingas* of the principal Pannel, and that they return a new *Tales*; for there shall be but one Officer if the Array be quashed, because made but by one of the Coroners, or for Affinity in one, &c. yet the Process shall still go to the Coroners, *ita quod* the Coroner *se non intromittat*.

If Default be in the Sheriff and Coroners, the Court may choose two Essofors, and if the Parties can say nothing against them, they shall make the Pannel.

To whom
Process shall
be directed
for Default
in the Sheriff
and Coroners.

But

But the *Distingas* shall not be directed to *Essofors*, for the Court cannot make Officers to distrain the King's Liege People, but the King may. 8 H. 6. 12. *dubatur*.

Process may be directed to the Justices of Assize, by Assent of Parties, not without.

When a Pannel is made by the *Essofors*, they shall afterwards serve all Process that comes upon this, as the Sheriff should, 15 E. 4. 24. 18 E. 4. 3, 8. Roll. tit. *Trial* 670. For it may be the Sheriff will distrain only those who are his Friends, and be partial.

When the Process is once awarded to the Coroners, for a Default in the Sheriff, if there be a new Sheriff made afterwards, who is indifferent, yet the Process shall not revert, but continue to the Coroners *pendant le Plea*, 14 H. 7. 31. Bro. tit. *Venire facias* 17. So the Entry is, *Ita quod Vicecomes se non intromittat*. 18 E. 4. 3. 8 H. 6. 12.

Venire facias once directed to the Coroners, shall not be to the Sheriff afterwards.

Sheriff shall not return the *Tales*, where he cannot the *Venire facias*.

And therefore where the Sheriff ought not to return the *Venire*, he cannot return the *Tales*. For in Error in the *Exchequer-Chamber* of a Judgment in the *Queen's Bench*, the Error assigned was because the *Venire facias* was awarded to the Coroners, for Consanguinity in the Sheriff; and it was returned by the Coroner, and afterwards the *Tales* was awarded, and it was returned by the Sheriff, and it was tried, and a Verdict given, and Judgment. And for this Cause held to be erroneous, and not aided by the Statute of 32 H. 8. or 18 Eliz. Wherefore the Judgment was reversed, Cro. 3 par. 574. Bro. tit. *Octo Tales* 9.

I will instance one Case more in the same Reports, fol 586. because it is very full in the Point. After issue in *Trespas*, the Plaintiff for his Expedition surmised, that he was Ser-

vant to the Sheriff, which being confessed by the Defendant, the Process was awarded to the Coroners; and after Verdict it was moved in Arrest of Judgment, that the *Tales de circumstantibus* was awarded and returned by the Sheriff, which was held by the whole Court to be good Cause for staying the Judgment; for it is a Mis-trial, not aided by any of the Statutes; for Process being once awarded to the Coroners, the Sheriff afterwards is not the Officer to return the Jury, no more than any other Man, and Process ought always to be returned by him, who is an Officer by Law to return it; otherwise it is merely void. But afterwards, upon View of the Record, it appeared that the *Tales* was returned by the Coroners, and their Names annexed thereto; wherefore it was without further Question. But the Court said, if their Names had not been annexed to the *Tales*, yet it had been well enough; for they be annexed to the first Pannel, and it shall be intended that the right Officer returned it; and the usual Course is, That to such *Tales* there is not any Officer's Name subscribed, and yet it is good enough; for it is not within the Statute of *York*, which appoints, That the Name of the Sheriff should be subscribed; but it was moved that the Record of the *Postea* is, That the *Tales* were returned by the Sheriff; but the Court held, that it was amendable, and it was done accordingly, and the Plaintiff had Judgment.

But if the *Venire* be awarded to the Coroners, for Default in the Sheriff, and they do nothing upon the Writ, then I suppose, upon a Default discovered in the Coroner, *de puisne temps*, the Party may shew this to the Court, and

Where the Coroner returns the *Venire facias*, he ought to return the *Tales*.

No Name to the Return.

Venire facias to the Sheriff, after one awarded to the Coroners.

and have a *Venire* awarded to the Sheriff, (if there be an indifferent one made in the mean Time) or else to *Eslistors*, & *sic è converso*.

Venire facias
to the Coro-
ners, after one
to the Sheriff.

In Error of a Judgment in Chester, the Parties being at issue, a *Venire* was awarded to the Sheriff, and at the Day of the Return, it was entred *Quod Vicecomes non misit breve*. And then the Plaintiff prayed a *Venire facias* to the Coroners, for Cozenage betwixt him and the Sheriff, which was awarded accordingly; and at the Day of Trial the Defendant made Default, and there, upon Judgment, Error was assigned, because that after the Plaintiff had admitted the Sheriff to execute the Writ, he could not pray a *Venire facias* to the Coroners, without some Cause *de puisne Temps*; *sed non allocatur*, because there was nothing done upon the first Writ. And the Defendant having made Default, it was not material. Cro. 3 Part, 853.

No *Venire fa-*
cias to the
Coroners, af-
ter one to the
Sheriff.

But the Defendant might have demurred to this Prayer; for if the Plaintiff pray a *Venire facias* to the Sheriff, he shall not challenge the Array, nor have a *Venire* afterwards to the Coroners, because the Sheriff is his Cousin, or for any other principal Challenge, whereof he might by common Intendment have Conusance, when he so prayed the *Venire facias*; for upon shewing this Cause at first, he might have prayed Process to the Coroners; but for a principal Challenge, of which, by common Intendment, the Plaintiff could not know at the first, as that the Defendant is of kindred to the Sheriff, &c. he may afterwards challenge the Array when they appear; or if the Sheriff doth nothing upon the Writ, he may pray a new *Venire* to the Coroners, 15 H. 7. 9.

If

If the Plaintiff prays a *Venire facias* to the Coroner, because he is of Kindred to the Sheriff, if the Defendant will not confess this, but denies it, this shall be entred, and the Defendant shall not challenge the Array for this Cause afterwards. *Br. tit. Venire facias* 21, and 23.

If the Defendant denies the Plaintiff's Suggestion, he shall have no Benefit of it by Challenge.

If a *Venire facias* be awarded to the Coroners where it ought to be to the Sheriff, or the *Visne* cometh out of a wrong Place, yet if it be *per assensum partium*, and so entred of Record, it shall stand; for *omnis consensus tollit errorem*, 1 *Inst.* 126. lib. 5. 36. But if it be directed to the Coroners, where it ought to be to the Sheriff, without such Consent of Parties, this is an insufficient Trial, not remedied by any Statute, except it be upon an insufficient Suggestion, and then the Statute of 21 *Jac.* c. 12. helps it.

By Consent, the *Venire facias* may be directed to a wrong Officer.

Mistrial without such Consent.

Upon Suggestion that the Plaintiff and the Sheriff, and one of the Coroners are of kindred to the Plaintiff or Defendant, or upon any other Suggestion which contains a principal Challenge, the *Venire facias* may be directed to other Coroners, *Dyer* 367.

Venire facias to some of the Coroners.

Error of a Judgment in *Northampton*, because in *Northampton* the Court being held before the Mayor and two Bailiffs, the *Venire facias* upon the Issue was awarded to the two Bailiffs to return a Jury, before the Mayor and Bailiffs, *secundum consuetudinem*, which being returned and Judgment given, the Error assigned was, because the Bailiffs being Judges of the Court, could not also be Officers to whom Process should be directed, there being no Custom that can maintain any to be both Officer and Judge. But all the Court (*absente Hyde*) conceived it might be good by Custom,

Judge and Officer to return Writs.

Custom, and that it is not any Error; for the Judges be not the Bailiffs only, but the Mayor and Bailiffs; and it is a common Course in many of the ancient Corporations, where the Bailiffs are Judges, or the Mayor and they be Judges; yet in respect of executing Process, they be Officers also; and one may be Judge and Officer *diversis respectibus*, as in Reddisseisin, the Sheriff is Judge and Officer: Whereupon Judgment was affirmed, Cro. 1 Part, 138.

Venire facias to the Garden of the Palace of Westminster. Roll. tit. Trial 667.

In Trespass and Assault laid in the Court, to be at the Palace of Westminster; it was adjudged, that the *Venire facias* shall issue *al Gardeden del Palace*, and not to the Sheriff of Middlesex, Bro. tit. Ven. fac 31.

Award of *Venire facias*.

In Trespass against two, if one plead, and two Issues are joined upon his Plea, and two other Issues are also joined, and the Court award a *Venire ad triandum tam exitum illum quam prædictum alium exitum inter the Plaintiff and the other Defendant, &c.* this is a good Award, although there be several Issues betwixt the Plaintiff and both Defendants, because that this word *Exitus* may be for all, *reddendo singula singulis*, Hob. 91.

Proce in Hundred.

If an Inquest remain for Default of Rapers, and a *Decem Tales* is awarded, and the Defendant saith for his Deliverance, that he is Lord of the Rape, where, &c. and that all there are within his Distress, and prays a Writ to the next Hundred; the Court may try this by Tryors presently, without a Return of the Sheriff; and if it be true, may award to the next Hundred; otherwise if it be false, 3 H. 6. 39.

Rex

Rex versus Reed; Upon an Information of Perjury at the Common Law, one of the Jurors was named *J. S.* in the *Venire*, and *J. S.* junior in the *Distringas*, and yet held to be good, 1 *Sid.* 66.

In an Action on the Case for Deceit; or, in an Action on the Case for an Escape; the Court will not change the *Venue* from the County where the Plaintiff hath supposed the Fact to be done, 1 *Sid.* 87.

Tubbe versus Whiteworth; In an Action on the Case, it was moved in Arrest of Judgment, That the *Venire facias* was of *Taunton-Dean*, and therefore no good Trial, for *Taunton-Dean* was a large Country consisting of several Vills; but the Court held it to be good after Verdict, and that it should be intended the Vill, and not all the Country of *Taunton-Dean*, 1 *Sid.* 88.

In *Kighly versus Bulky*; it was held, That where the Issue was local, the *Venire* could not be chang'd by the Consent of the Parties, 1 *Sid.* 339.

Swaine's Case; if there be two Causes of Action in the Declaration, one in one County, and the other in another County; and Affidavit of the Cause of Action (if any) in one of them, yet that shall not exclude the Plaintiff of his Election; as in *Trover*, if the Defendant becomes possessed in *Kent*, and he brings the Goods and sells them in *London*, and the Plaintiff brings his Action in *London*; there, upon the common Affidavit, the *Venire* shall not be removed from *London*; and in the principal Case now moved in *Assumpsit*, the Promise was agreed to be in *Dorchester*, and the Breach in *Middlesex*; and the Plaintiff declared in *Middlesex*; and the Court upon Affi-

E

davit

Variance between the *Venire* and *Distringas*, and yet good.

Where the Court will not alter the *Venue*.

Venue from a Place containing several Vills.

If the Issue be local, not to be chang'd by Consent.

Cause of Action in two Counties, the Plaintiff may chuse either.

devoit would not change the *Venue* to *Dorchester*, 1 *Sid.* 405.

Venue twice
chang'd.

King versus *Atkins*; *Action sur Assumpsit* was brought in *London*, and upon the common *Affidavit* the *Venire* was chang'd to *Hampshire*; and altho' it was chang'd, the Plaintiff in another Term made *Affidavit*, That his Cause of Action arose in *Northamptonshire*, and upon a Rule, that he should not give in Evidence any Matter out of *Northamptonshire*, it was laid there notwithstanding he had first laid it in *London*, 1 *Sid.* 442.

One Sheriff
not indiffe-
rent, *Venue* to
be directed to
the other.

Venire de novo
to Issue where
the Parties do
not proceed
to Trial, at
the first Af-
fizes after the
Teste of the
*Habeas Corpo-
ra* or *Distrin-
gac.*

Where there are two Sheriffs, and one chal-
lenged, the *Venire* shall be directed to the
other Sheriff, and not to the Coroners, *Shower*
329.

If any Plaintiff, or Demandant, being at
Issue, shall bring to the Sheriff any Writ of
Habeas Corpora, or *Distringas*, with a *Nisi prius*
Issue, in order to try such Issue at the Assizes,
and such Plaintiff or Demandant shall not pro-
ceed to Trial at the first Assizes after the *Teste*
of such *Habeas Corpora*, &c. In all such Cases
other than where Views of Jurors shall be di-
rected, the Plaintiff or Demandant, when
he shall think fit to try the said Issue at any
other Assizes, shall sue forth a new Writ of
Venire, whereupon the Plaintiff or Demandant
may proceed to Trial; and so *toties quoties*, as
the Case shall require: So also where the Te-
nant or Defendant shall bring the Cause to
Trial by *Proviso*, 7 & 8 *W. 3. cap.* 32.

C H A P. IV.

What Faults in the Venire Facias shall vitiate the Trial, what not. When a Venire Facias de novo shall be awarded; when several Venire Facias's. When the Venire Facias shall be betwixt the Party and a Stranger to the Issue; who may have a Venire Facias by Proviso, and when.

WE have now shewed you to what Officer the *Venire facias* shall be directed; The next Step in the Writ is *Præcipimus tibi quod Venire facias*: Which words *Venire facias*, *Venire facias, why the Writ so called.* are the most effectual Words in the Writ, and therefore they give the Denomination to the whole Writ: And here Opportunity is offered us to speak something of a *Venire facias* in general. I am not ignorant how our Books swarm with Cases which arise from the Defects in this Process, and how that Verdicts have been set aside, Judgments stayed and reversed, for want of sufficient Returns, Misawarding, Disagreement with the Rolls, Discontinuance, and many other Faults in this Writ. But the Statutes of *Jeofails* (especially Statute of the Statute 21 Jac. cap. 10.) have pardoned *Jeofails,* (as I may so say) these Enormities: As, *The 21 Jac. 1. 13.* Awarding this Writ, Hab. Corpora, or Distringas. to a wrong Officer, upon any insufficient Suggestion, or by reason the *Vilne* is in some part misawarded, or sued out of more Places or fewer Places than it ought to be, so as some Place be right
E 2 named :

named: The Mis-naming of any of the Jury, either in Surname or Addition in any of the said Writs, or in any Return thereupon, so that upon Examination it be proved to be the same Man that was meant to be returned; or if no Return be upon any of the said Writs, so as a Pannel of the Names of the Jurors be returned, or annexed to the said Writ; or if the Sheriff or Officer's Name, having the Return thereof, is not set to the Return of any such Writ, so as upon Examination it be proved that the said Writ was returned by the Sheriff or Under-Sheriff, or such other Officer: In all these Cases the Judgment shall not be stayed, nor reversed for these Defects.

But this Act doth not extend to any Writ, Declaration, or Suit of Appeal of Felony or Murther, nor to any Indictment or Presentment of Felony or Murther, or Treason; nor to any Process upon any of them; nor to any Writ, Bill, Action, or Information upon any popular or penal Statute; wherefore, since Informations and popular Actions are grown so frequent, the Attorneys, &c. herein had best beware of these *Jeofails*.

Popular Action, &c.

Christian-Name mistaken in the *Venire facias*, incurable.

By this Statute many Defects are remedied, which were not by the Statutes of 32 Hen. 8. cap. 20. and 18 Eliz. cap. 14. yet all are not; for this Act only helps the Mis-naming of a Juror in Surname, or Addition, and saith nothing of his Christian-name: Wherefore I conceive the Law in *Codwel's Case*, in the fifth Report, as it was then; which is, that if a Juror be mis-named in his Christian Name on the *Venire*, though he be named right in the *Distringas* and *Postea*, yet this is ill, and not amendable, and with this agrees *Goddard's Case*, Cro. 2 Part, 458.

And

And since the Court (Cro. Part I. fol. 203) Christian-
 doubted thereof, I may well put the Que- Name right
 stion; If a Juror be right named upon the in the *Venire*
Venire, and mis named in his Christian Name *facias*, and
 in the *Distringas*, &c. whether this is amend- wrong in the
 able, or not? Without Dispute it is not by *Distringas*.
 the Statute of 21 Jac. for that only helps the
 Surname. But with Reverence to the Court's
 Doubt, I conceive clearly, it is holpen by the
 Statutes of 32 H. 8. and 18 Eliz. as a Discon-
 tinuance of Process; and I may with the
 more Confidence believe it, because in *Cod-*
wel's Case aforesaid, where, in the Pannel of
 the *Venire*, a Juror was named *Palus Cheale*, and
 in the *Distringas*, &c. he was right named
Paulus Cheale; and so, because he was mis-
 named in his Christian-Name in the *Venire*,
 Judgment was arrested. But it is there ad-
 judged, that if he had been well named upon
 the *Venire*, and mis-named on the *Distringas* or
Postea, then upon Examination it should be
 amended. But the Countess of *Rutland's* Case,
Lib. 5. 42. is express in the Point, and so is
Cro. 3 Part, 860. Roll. 196. Teppet in the *Venire*
 and *Tipper* in the *Distringas*, amended. And so
 if the Mistake be in the Pannel *Jurata*, the
 Sheriff may come into Court and amend it.
 And so if *Samuel* be in the *Venire* and *Distrin-*
gas, and *Daniel* in the *Nomina Juratorum*, up-
 on Examination, this may be amended. And
 so if the Name be right in the *Venire*, and mi-
 staken in the Christian-Name in the *Distrin-*
gas or *Postea*, it is amendable, *Roll. 197.* And
 so if he be *De A.* in the *Venire* and *Distringas*,
 and *De B.* in the *Nomina Juratorum*, this is
 amendable.

And it is to be known, that in most Cases
 where the *Venire facias*, *Habeas Corpora*, or *Di-*
stringas,

*Venire facias
de novo.*

One Jury
shall not try a
Cause twice.

*Venire facias
de novo.*

stringas, be defective, they are to be amended; but if the Malady be so fatal in the *Venire*, that it causes a Mis-trial, (as in the Mistake of a Juror's Christian-Name, or where a Juror not returned, is sworn, &c.) then the Verdict is to be set aside, and a *Venire facias de novo* to be awarded; and so was it to be upon those Mistakes, (now amendable by the Statutes) before the making thereof; and where a Jury giveth a Verdict, which is accepted and recorded by the Court, be the Verdict perfect or imperfect, the Jurors are discharged, and shall never try the same Issue again upon a new *Nisi prius*. But if the Verdict be so imperfect, that Judgment cannot be given upon it, then the Court shall award a *Venire facias de novo*, to try the Issue by other Jurors, *Lib. 8. 65. Bulstr. 2 Part, 32.*

If upon an Issue all the Matter be not fully enquired, a *Venire facias de novo* shall issue, *18 E. 3. 50.*

In an *Audita Querela*, if the Parties go to Issue upon Payment, according to the Defeazance of the Statute, and this is found for the Plaintiff, but the Jury do not assess Damages, the Court shall award a *Venire facias de novo*, to assess Damages, *22 E. 3. 5. Vide hic, cap. 6. and R. 2. tit. Trial 593, 595.*

If the Record of the *Nisi prius* be *unum modum tritici* for *modium*, and the Plaintiff is Non-suit at the Assize, for this Mistake, if the Record in Court be right, *scil. Modium*, this Non-suit shall not be recorded, but a *Venire facias de novo* shall be awarded. So for any other Mistake, as if the Record in Court be in *Grays-Inn Lane, &c.* and the *Nisi prius*, which is but a Transcript, be *Graves-Inn Lane, &c.*
For

For this is a Nonsuit upon another Record than what is in Court.

In Battery against Three, who plead three several Pleas, and upon the Writ of *Nisi prius*, two Issues are found for the Plaintiff, and Damages assessed; but nothing is found for the third Issue, this is a Mis-trial, and a *Venire facias de novo* shall issue.

In Detinue, if the Jury find Damages and **Detinue.** Costs, but no Value, as they ought, this shall not be supplied by a Writ of Inquiry of Damages, but a *Venire facias de novo* shall be granted. And so of other Defects in finding the full Issue.

In a *Quare Impedit* if the Issue be found for *Venire facias* the Plaintiff, but by Negligence the Jury do *de novo.* not inquire of the four Points, *scil. de plenitudine, ex cujus præsentatione, si tempus semestre transierit*, and the Value of the Church *per Annum*; this shall be supplied by a Writ of Inquiry, without a *Venire facias de novo*, because the Court *ex Officio*, ought to have charged the Jury with the four Points of Inquiry, and if the Jury had found them, no Attaint lay; for as to this they were but as an Inquest of Office.

In a Writ of Annuity, if the Issue be found **Annuity.** for the Plaintiff, but the Jury do not assess Damages or Costs, this shall not be supplied by a Writ of Inquiry, but a *Venire facias de novo* shall be granted.

In Ejectment against Baron and Feme, and **Ejectment.** the Jury find the Wife Not guilty, and find a Special Verdict as to the Husband, which Special Verdict is afterwards adjudged insufficient by the Court, a *Venire facias de novo* shall be granted for both, as well the Wife as the Husband, and the Wife may be found guilty, be-

Imperfect
Verdict.

cause the Record and Issue is intire, and the Verdict is insufficient and void *in tout*.

So if there be several Issues, and the Jury find^r some well and directly, and in others Special Verdicts, which are imperfect, a *Venire facias de novo* shall be granted for all, and the Jury may find contrary to their first finding.

In Trespass of Assault and Battery, and taking away of Grain, and the Defendant as to the Battery justifies in defence of his Grain, upon which the Plaintiff demurs; and as to the Grain he pleads Not guilty, which is found for the Plaintiff, and the Jury do not tax Damages for the Battery depending in Demurrer as they ought; in this Case, if the Demurrer be afterwards adjudged for the Plaintiff, yet the Damages for this cannot be afterwards supplied and taxed by a Writ of Inquiry of Damages, but a *Venire facias de novo* shall issue to Trial, because all is comprised in one Original. *Vide apres, cap. 13. and devant, cap. 2.*

Who shall grant it?

In a *Scire facias* upon a Recognizance in Chancery, if the Parties be at Issue, upon which the Record is commanded into B. R. and there it appears that the *Venire facias* is not well awarded, the *Venire facias de novo* shall be awarded in the King's Bench, and not in the Chancery, *Roll. tit. Trial 723.*

Album Breve,
the County
left out in a
Venire facias.

In *Ylverton's Reports, fol. 64.* The Case is, That a *Venire facias* was made *Viccomiti*, leaving out *Salop*, for which there was a Blank left in the Writ. But *re vera*, it was returned by the Sheriff of *Salop*. In Arrest of Judgment it was alledged that the *Venire facias* was vitious for this Cause; but *Gawdy* said it should be amended; and by *Fenner and Williams*, it is as no Writ, because it is not directed to any Officer.

ficer. And then it is aided by the Statute of *foefails*; for it might rather be called a Blank than a Writ, because it was directed to no Officer. If there be no Return of the Sheriff indorsed upon the *Venire facias*, it was held not amendable, 35 Eliz. Lib. 5. 4. Otherwise of the *Distringas*, if that be *Album breve*, and no return, if the *Venire facias* be right, Roll. tit. 204.

In Cases where there are several Defen- Several *Venire*
dants, who plead several Pleas, the Plaintiff *facias's*.
may chuse either to have one *Venire facias* for all, or several, for every one of the Defendants; but (if you will be ruled by *Staundford*) the surest Way is to have a *Venire facias* against every one, and then one cannot have Benefit of the others Challenge; neither shall the Death of one abate the *Venire facias* against the other; (this he speaks of in Appeals) but if the Court once award a joint *Venire facias*, you cannot have several *Venire's* afterwards, though there be nothing done upon the first; except it be upon Matter *de puisne Temps*, as the Death of one of the Defendants, &c. Lib. 8. 66. Lib. 11. 5, 6. *Staundf.* 155. Bro. tit. *Venire facias* 2. 35.

But now it is the usual Course to have but One *Venire*
one *Venire facias* upon several Issues, though *facias* in several Issues.
against several Defendants, Cro. 3 Part, 866. *Vide* Roll. tit. Trial 596, 625, 667.
Hob. 36, 64. And so usual, that the Court declared, Cro. 2 Part, 550. That there never shall be several *Venire facias* to try several Issues in one County; for what need the Plaintiff trouble himself and the Country with several, when one Jury will serve his Turn; *Et frustra fit per plura quod fieri potest per pauciora*. But otherwise if it be in two Counties, Cro. 3 Part, 866. *Hob.* 88, 51.

After

Venire facias between the Plaintiff and two Defendants where one is dead.

No Surmise in judicial Writs, of Death in one of the Parties.

Venire facias dated before the Action brought.

Parties Names mistaken in a *Venire facias*.
Mis-trial.

No *Venire facias* holpen.

After Issue joined by two Defendants, if one of them die, and then a *Venire facias* is awarded betwixt the Plaintiff and both the Defendants, and so in the *Habeas Corpora* and *Distringas*, yet this shall not vitiate the *Venire facias*, &c. to make Error; because, though one of the Defendants be dead, yet the other being alive, it is sufficient. And there needs be no Surmise in judicial Writs, that one of the Defendants is dead; it is time enough to shew it to the Court at the Day in bank, *Cro. 1 Part, 4, 26.* But if there be two Defendants, and the *Venire facias* be but against one of them, 'tis Error, *7 H. 4. 13. and Bro. tit. Ven. fac. 11. Cro. 1 Part, 426.*

If the *Venire facias* bears date before the Action brought, or varies from the Roll, yet it is aided by the Statutes of *Feofails*, *Cro. 1 Part, 38, 90, 91, 203, 204.* *Miscontinuance or Discontinuance, or Misconveying of Process*, is aided by *32 H. 8. 30.* *The Want of any Writ original or judicial, Defaults in their Form, and insufficient Returns thereupon, are aided by 18 Eliz. 14. Cro. 3 Part, 259.* But you must have a Care the *Venire facias* be not Faulty in any other Matters of Substance; for if the Parties Names be mistaken, or the Issue, as if the Issue be *ne unques Executor*, and the *Venire facias* be *in placito debiti*, &c. this is a Mis-trial. *Cro. 2 Part, 528.* So it is if the *Venire facias* be *in placito transgressionis*, where the Action is *in placito transgressionis & ejectionis firmæ.* This Misawarding of Process is not aided by any of the Statutes; and better it were that there had been no *Venire facias* at all in such a Case, for then the Statutes would have holpen it, *Cro. 3 Part, 622. Stat. 18 Eliz. 14.*

If

If a *Venire facias* be directed to the Coroners, all the Coroners ought to join in the Return, they being Ministers not Judges; and so both the Sheriffs of *London* ought to join, or else the Return is not good, *Hob.* 97.

Note, The principal Statutes of *Jeofails* are 8 H. 6. cap. 12. and cap. 15. 32 H. 8. cap. 30. 18 Eliz. cap. 14. 21 Jac. cap. 13. and 16. and 17 Car. 2. 8. Entituled, *An Act to prevent Arrests of Judgments and superseding Executions.* And the three first of these Statutes do not extend to Appeals, nor to Pleas of the Crown, or to any Proceedings upon them, for these are excepted, nor to the Amendment of any Exigent, to make any one outlawed. As you may see at large, *Lib.* 8. 162. *Blackamore's Case.*

Note, If the *Distingas* be betwixt wrong Parties, as if the Parties Names are mistaken, the Judge of Assize cannot proceed if the Mistake be insisted upon; altho' it would have been no Error after Verdict; held so before Justice *Windham*, *Lent Assize*, 1681. And so I have known it ruled by other Judges, and the Trial refused. See *Littleton's Reports* 253.

And the four last of the said Statutes do neither extend to them nor to Actions or Informations upon Penal Laws, only in the last of them, viz. 16, 17 Car. 2. there is a Limitation in the Negation of the Extent, scil. *Other than concerning Customs, Subsidies of Tonnage and Poundage, to which it doth extend.*

If the *Venire facias* be directed *Vicecomiti London, Salutem, &c. præcipimus tibi*, and not *vobis*, after Verdict this is amendable, 39 Eliz. B. R. Adjudge, *Roll.* 200.

And so it is, if after *& babeas ibi hoc breve, & Nomina Juratorum* be left out, *ibid.* and 204.

But

But if the Date of the *Teste* be after the Return, this was held not amendable, 32 & 33 Eliz. B. R. *ib. sed vide hic ante*. But if the Award of the *Venire facias* upon the Roll be right, and the Writ wrong, it may be amended by the Roll, as the Misprision of the Clerk, *ibid* 204.

If the words *Quorum quilibet habeat* be left out, or *duodecim*, or *qui nulli affinitate attingunt*, or *Vicecomiti* be left out, these are amendable as Mistakes of the Clerk, *Roll* 204, 205.

Venire facias
between a
Party and a
Stranger.

In some Cases a *Venire facias* shall be awarded to make an Enquest betwixt a Stranger to the Writ and Issue, and the Party. I will instance but in one, and that is upon the Statute of *Westm. 2. cap. 6*. If a Tenant being impleaded vouch to Warranty, and the Vouchee denieth the Deed, or other Cause of the Warranty, &c. that the Demandant may not hereby be delayed, he may sue out a *Venire facias* to try the Issue between the Tenant and Vouchee.

Inquest at
whole Re-
quest.

Venire facias
by *Proviso*.

Inquests in Pleas of Land, shall be as well taken at the Request of the Tenant, as of the Demandant, 2 *Edw. 3. cap. 16*. If the Plaintiff or Demandant desisteth in prosecuting his Action, and bringeth it not to Trial, then the Defendant or Tenant may sue forth a *Venire facias* with a *Proviso*, which is to no other End but that the Sheriff should summon but one Jury, if the Plaintiff also should have brought him another Writ to the same Purpose; and although (as my Lord Dyer saith, *fol. 215.*) the Granting of this *Venire facias*, &c. with a *Proviso*, depends much upon the Discretion of the Court, yet for the greater Part it is not grantable for the Defendant, unless

unless when he is actor as well as the Plaintiff, or unless there be a Default, and *Laches* in the Plaintiff; therefore there can be no Trial by *Proviso* against the King (unless with the Attorney-General's Consent) because no Default or *Laches* can be imputed to the King. But an Avowant in Replevin may have a *Venire facias* with a *Proviso*, immediately after Issue joined, because he is Actor, and in Nature of the Plaintiff. Proof presently after Issue joined.

If the Plaintiff in Detinue and the Garnishee be at Issue, and the Plaintiff prays a *Nisi prius*, and this is granted, yet the Garnishee at the same Time may have a *Nisi prius* with *Proviso*, because he is Plaintiff also, *Lib. 6. 46. Roll. tit. Trial 629.* Garnishee.

If the Plaintiff deliver the Writ to the Sheriff *tarde*, so late that he cannot serve it, the Defendant shall have a Writ with *Proviso*. Tarde.

But at the same Time the Plaintiff may have another Writ, and the Sheriff may return which of them he pleases at his Election, *8 H. 6. 6.*

The *Proviso* ought to be, *quando duo brevia sunt in eodem gradu & qualitate.*

If the Default be in the Plaintiff after Issue in the prosecuting of the *Venire facias*, then the Defendant may have a *Venire facias* with *Proviso*, but not a *Habeas Corpus* with a *Proviso*, until the Plaintiff have made a Default in the same Writ; for he ought only to have the same Process with a *Proviso*, in which there was a Default of the Plaintiff first: And therefore although the Defendant had a *Venire facias* with a *Proviso* upon a Default of the Plaintiff, yet he cannot have a *Nisi prius* by *Proviso*, without another Default of the Plaintiff.

If

If the Defendant had a *Habeas Corpus* by *Proviso*, and the Jury remain for want of Hundredors, yet he cannot have a *Distingas Jur.* with a *decem Tales cum Proviso*, until a Default of this Request of a *Tales* is in the Plaintiff. *D. 15 El. 318. 10.*

How the Plaintiff may stop the Defendant's *Proviso*. But note, The *Nota* (in *Staundford's Pleas del Coron. fol. 155.*) That if by Negligence of the Plaintiff, the Defendant iues a *Venire facias* with a *Proviso*, yet the Plaintiff may at his Pleasure stay the Defendant, that he shall not proceed in his Process, in praying a *Tales* upon the Defendant's Process, as it appears *T. 15 H. 7. fol. 9.* And the Defendant shall never be received to pursue this Process with a *Proviso*, so long as the Plaintiff pursues, or is ready to pursue, as appears *Mich. 14 H. 7. fol. 7.*

Tales Men.

And seeing the *Tales Men* offer themselves to us, we will tell them upon what Account they come, before they thrust themselves into the Inquest, commonly for the Love of eight Pence; but it may be to do some of their Neighbours a shrewd Turn.

C H A P.

C H A P. V.

Why the Venire Facias runs to have the Jury appear at Westminster, though the Trial be in the Country. Of the Writ of Nisi Prius, when first given, when grantable, when not, and in what Writs. Of Justices of Nisi Prius. Of the Tales at Common Law and by Statute. When the Transcript of the Record of the Nisi Prius differs from the Roll, whereby the Plaintiff is nonsuited, he may have a Distringas de novo.

BUT to observe the Method of the Writ, the next Words are *coram Justiciariis nostris de Banco apud Westminster. tali die*. And here first of all you may ask me, to what Purpose the Sheriff is commanded to cause the Jury to come to *Westminster*, when they are to try the Cause in the Country, and in Truth are not to come to *Westminster*? I must confess, the Resolution of this Question is not unnecessary: Wherefore we must know, That originally, before the Writ of *Nisi prius* was given, the Purpose for which the twelve Men were to be summoned upon the Writ of *Venire facias* to come to *Westminster*, was that contained in the Writ, *videl. ad faciend. quantum furatum*; for then was the Trial intended to be there, if a full Jury appeared; if not, then a *Habeas Corpora*, (with a *Tales* sometimes annexed to it, the Form whereof you may

Why the *Venire facias* is to have the Jury appear at *Westminster*.
Hab. Corp.
see

Distingas.

Trials at Bar.

Where a Jury is not compellable to appear at *Westminster*.

Nisi prius, when first given and wherefore.

Staundford's Pleas of the Crown. 156.

Nisi prius in the *Venire facias*.

see in the Register,) and if they did not appear at the Return in the *Habeas Corpora*, then went out the *Distingas*. This I speak of the *Common Pleas*: But the Course of the King's Bench, and Exchequer is, after the *Venire facias*, to have a *Distingas*, leaving out the *Habeas Corpora*. Trials then were all at the Bar. (I speak not of Assizes) But now, because Jurors did not use to appear upon the *Venire facias*, it being without Penalty, Trials at the Bar are appointed upon the *Habeas Corpora* and *Distingas*, because the Jury will more certainly appear at the Day of the *Distingas*, through fear of forfeiting Issues; which the Sheriff returns on the *Distingas*, not on the *Venire facias*. By the Statute of 18 El. cap. 5. no Jury shall be compelled to appear at *Westminster*, for the Trial of an Offence (upon any penal Law) committed above thirty Miles from *Westminster*, except the Attorney-General can shew reasonable Cause for a Trial at Bar.

Thus it was at Common Law, before the giving of the Writ of *Nisi prius*, when all Jurors, together with the Parties, came up to the King's higher Courts of Justice, where the Cause depended; which (when Suits multiplied) was to the intollerable Burthen of the Country, 27 E. 1. cap. 4. wherefore by the Statute of *Westminster*, 2. cap. 20. a Writ of *Nisi prius* was first given; and that in the *Venire facias*, as we may see in the Form of the Writ there mentioned, scilicet *Præcipimus tibi quod venire facias coram Justiciariis nostris apud Westmon. in Octabis Sancti Michaelis, nisi tali die & loco ad partes illas venerint* 12. &c. By which Writ it appears that the *Venire facias*, was not returnable till after the Day of the *Nisi prius*. But the Mischief thereof was so

great

great, partly in respect that the Parties not knowing the Jurors Names, could not tell how to make their Challenges, and so were surprised; and partly in respect of the Jury, who were greatly delayed by the Effoins of the Parties, that by the Statute of 42 E. 2. cap. 11. it is ordained, *That no Inquest, but Assizes and Deliverances of Goals, be taken by Writ of Nisi prius, nor in other Manner, at the Suit of the great or small, before that the Names of all them that shall pass in the Inquests be returned in the Court.* And their Names must be returned upon a Panel annexed to the *Venire facias*, so that either Party may have a Copy of the Jury, that he may know whom to challenge; and the Jury not coming upon the *Venire facias*, make a feigned Default, which warrants the *Distringas*, &c. unless they appear at the Day of *Nisi prius*.

The Names of the Jurors must be returned into the Court before any Trial, and why.

So that by what hath been said, you may perceive to what Purpose the Sheriff is commanded to cause the twelve Men to come to *Westminster*, though the Trial be in the Country. And that, *ad faciend. quandam Juratam*, because it is in the Discretion of the Court, whether to grant a Writ of *Nisi prius*, or to have a Trial at the Bar. And for this, the Duke of Exeter being Plaintiff in Trepas, a *Nisi prius* was prayed for the Duke, and it was denied; for that the Duke was of great Power in that County. And if the Trial should be had in the Country, Inconvenience might thereupon follow, as you may read, 2 Inst. 424. and 4 Inst. 161. Nay, in some Cases (as if the Cause require long Examination, &c.) it is not in the Power of the Court to grant a *Nisi prius*, if the King please: For in such Cases, as appears by the Writ in the

It is in the Court's Discretion, whether to grant a *Nisi prius* or not.

When the Court cannot grant a *Nisi prius*.

Where the
King is con-
cerned.

Register, 186. the King by his Writ may restrain, and command the Justices that they shall not award any Writ of *Nisi prius*, and if they have, that they supersede it. *F. N. B.* 240, 241. No *Nisi prius* shall be granted where the King is Party, without especial Warrant from the King, or the Attorney-General's Consent, *Staundf.* 156. *F. N. B.* 241. 4 *Inst.* 161.

Certification
of Verdicts.

In a *Præcipe quod reddat*, if the Tenant after Aid of the King, pleads to the Inquest, the Plaintiff shall not have a *Nisi prius*, because the Tenant hath Aid of the King, and so the King is in a manner Party, 25 *E.* 3. 39. Neither is a *Nisi prius* to be granted, if any of the Parties may have Prejudice by it.

If the Justices *de Nisi prius* die before the Day in Bank, yet the Record shall be received from the Clerk of Assize, without a *Certiorari*, or other Form of Entry but the ancient Form.

Also in that Case a *Certiorari* may be directed to the Executors or Administrators of the Justices, to certify the Record, *Dy.* 4. 5 *Mar.* 163. 55. *Roll. tit Trial*, 629.

What Things
the Justices
of *Nisi prius*
may do.

They have no Power to increase Damages, nor to allow or disallow Protections, nor to allow a Plea of Excommengement in the Plaintiff. But they may record the Protection and the Default, and this shall be allowed or disallowed in *B.*

Jurors *sur
peine fine.*

They may demand the Jurors upon a *Peine*, they may amerce Jurors, and punish a Trespass, done in their Presence, which is in Despite of the King, and for this make Process, and may fine Offenders.

In Ejectment the Defendant may plead at the Assizes, that the Plaintiff hath entred into Parcel of the Land mentioned in the Declaration

claration *puis le darrein Continuance*, and the Plea *puis dar-*
 Justices of *Nisi prius* may accept this Plea, *rein continu-*
 for it is in their Election; for if they per-
 ceive the Plea is dilatory, they may refuse
 it, for it is at their Discretion, Sir Hugh
 Brown's Case, in *Scaccario Mich. 8 Jac. Roll.*
tit. Trial, 630.

If eleven Jurors be sworn, and the twelfth The Power
 is challenged, and the Jurors cannot agree of the Judge
 in the Challenge; for ten affirm the Chal- upon Dis-
 lenge, and the other denies it, although the agreement or
 Party which did not take the Challenge, will other Matter.
 not agree that the eleven sworn shall have Challenge.
 another to them in lieu of him that is chal-
 lenged, yet the Court may do this.

If a Challenge be taken to the Array be-
 fore any Juror is sworn, and Tryors be cho-
 sen, who cannot agree, yet they shall not be
 commanded in Custody, because they never
 were sworn upon the Principal. But the Court Jurors dis-
 may discharge them and chuse others. charged.

If there be three Tryors who will not agree,
 the Court cannot take the Verdict of two,
 and command the other to Prison. The same
 Law in Case of a Verdict upon an Issue.

Where fourteen Jurors are impanelled for
 the King, the Judge cannot discharge any of
 them after they are sworn, if not, that they
 will not agree with their Companions.

If the Jury say upon demand of the Court, Amercement
 that they are agreed, and afterwards when
 they are opposed, they say the contrary in
 any Matter, they may be amerced for this,
Roll. tit. Trial, 675.

And now since the *Nisi prius* (for so it is
 called, because the Word *Prius* is before *Vene-* *Nisi prius,*
runt in the *Distringas*, &c. which was not so led. why so cal-
 in the *Venire facias* upon the Statute of *W. 2.*

No *Nisi prius*
before the
Venire facias
returned.

cap. 30. before rehearsed.) must not be in the *Venire facias*, because the Names of the Jurors are to be returned to the Court, before the granting of the *Nisi prius*; therefore the *Nisi prius* is now in the *Habeas Corpus* and *Distingas*. And if the Sheriff return not a Panel of the Jurors upon the *Venire facias*, there shall be no *Nisi prius* upon the *Tales*, until a Panel be returned, 27 H. 6. f. 10. 1 H. 5. f. 11. which brings me again to speak of the *Tales*.

The *Tales* at
Common
Law.

A *Tales* is a Supply of such Men, as were impanelled upon the Return of the *Venire facias*, grantable, when enough of the principal Panel to make a Jury do not appear; or if a full Jury do appear, yet if so many are challenged, that the Residue will not make a Jury, then a *Tales* may be granted. And this at the Common Law was by Writs of *Decem tales*, *Octo tales*, &c. (out of the King's Courts) one of them after another as there was need, until there was a full Jury: But now by the Statutes of 35 H. 8. 6. 4, 5 P. M. 7. 5 Eliz. 25. and 14 Eliz. 9.

Tales by Sta-
tute.

The Justices of Assize and *Nisi prius*, at the Request of Plaintiff or Demandant, Defendant or Tenant, or of the Prosecutor *tam quam*, (if two, more, or but one of the principal Panel appear at the *Nisi prius*,) may presently cause a Supply to be made of so many Men as are wanting, of them that are there present standing about the Court; and hereupon the very Act is called a *Tales de circumstantibus*.

Note, the Difference between *Tales* at Common Law, and *Tales* by the Statute, the first called only [*Tales*.] the second [*Tales de circumstantibus*.] the last of which cannot be granted at a Trial at Bar, which is a Trial

at

at Common Law ; for there it must be only [Tales] by Writ annexed to the *Venire facias*. But *Tales de circumstantibus* is given by Statute to Trials by Assize and *Nisi prius*, per Stat. 35 H 8. 6. Yet such a *Tales* to an Indictment in *Wales* was out of that Statute, and helped by the 4 and 5 Ph. and Mar. 7.

If the Issue be to be tried by two Counties, and one full Inquest appear of one County, but the Inquest remain for Default of Jurors of the other County, a *Tales* shall be awarded to the County where the Default is, not to the other. *Tales, in what Cases it shall be granted.*

If a Juror die after he is impanelled, a *Tales* shall issue, not a *Venire facias*.

Upon a *Pluries Distingas* three only appear, the Plaintiff prays another *Distingas*, without praying a *Tales*, yet if the Defendant prays a *Tales*, the Court ought to grant it, Dy. 20 El. *What Persons may have a Tales.*

359. 2.

A *Tales* shall be granted in an Attaint, if all the Grand Jury make Default. *In what Cases.*

It cannot be granted at the Day of the Return of the *Venire facias*. *At what Time.*

If the *Venire facias* be good, and the *Habeas Corpus* ill, if the Panel be affirmed, yet the *Tales* is void, for in Effect there is only a *Venire facias* returned, and then no *Tales*.

If the Defendant hath a *Habeas Corpus* with a Proviso, yet the *Tales* ought not to be granted with a Proviso, at the Defendant's Request, before a Default in the Request of a *Tales* in the Plaintiff. *Tales with a Proviso.*

At Common Law before the Statute, by Custom of a Court, a *Tales de circumstantibus* might be granted, for this is a good Custom, *Dubitatur*, Roll. tit. Trial, 672.

Tales denied.

If great Persons are concerned, and by their labouring the Jury doth not appear, and *Tales* Men are prepared for their Turn, and there is a great Tumult *de circumstantibus*; the Justices of their Discretion may deny a *Tales*, and adjourn in Bank, notwithstanding the Statute. The principal Panel must stand, or else there can be no *Tales*.

If the Bailiff of the Franchise answer, that there be not sufficient of his Bailiwick, the Justices may award a *Tales de circumstantibus* to be returned by the Sheriff.

If the Tenant for Life pray in Aid of the King, who hath the Reversion, the Justices cannot grant a *Tales de circumstantibus*, because the King is concerned.

If two Coroners or Essofors return the Panel, one of them cannot return the *Tales*, &c.

If the Defendant sue the Writ of *Nisi prius*, by Proviso, yet the Plaintiff may have a *Tales*, &c.

Attorney.

The Sheriff may return twenty four, forty, or any Number upon the *Tales de circumstantibus*. And it may be prayed by Attorney (although the Statute doth not mention an Attorney) as well, as in proper Person. The Vouchee in a *Præcipe quod reddat* may pray a *Tales*, though he be neither a Plaintiff nor Demandant in the first Action.

If there be three Plaintiffs in *Replevin*, &c. and one of them makes Default at the *Nisi prius*, the other two cannot pray a *Tales*; otherwise of two Copartners.

Mayor and Commonalty in their proper Persons cannot pray a *Tales*: A Bishop or Abbot may,

Two Plaintiffs in Trespass, and at the *Nisi prius* the Defendant shews a Record to the Court, by which it appears that one of the Plaintiffs was outlawed after the last Continuance, the other cannot pray a *Tales*.

The Sheriffs upon the *Tales de circumstantibus*, may impanel a Priest or Deacon, if he hath sufficient Freehold of Lay-Fee, but not an Infant, nor one of the Age of eighty Years.

He may impanel Coroners, Capital Ministers of any Corporation, Foresters, Men blind, mute (if they have their Understanding, but not deaf Men) excommunicated Persons, but not outlawed or attaint, not Aliens, nor Clerks attainted, no Persons attainted of false Verdicts.

What Persons
of the *Tales*.

The Coroners may put the Sheriff on the *Tales*.

It seems by the Statute, none of the Parties can challenge the Array of the *Tales*, but only to the Poll.

Challenge.

After a Challenge to the Poll tried, there shall be no other Challenge to the same Poll, for any Cause or Matter that is at the same Time.

In an Action of Trespass for taking away the Plaintiff's Money, one of the *Tales* was challenged, because he was a common Fosterer of Thieves, and dwelt in a suspicious Place, and of ill Fame, and held a good Challenge.

For Challenges, see the Title *Challenge* at large.

What Issues shall be tried by *Tales de circumstantibus*, see *William's Reading*, & *hic cap. 7.*

But since none can come after the Reporter, observe with me his *Nota Lector* in his 10th Report, 104. That at Common Law, in the granting of a *Tales* five Things are to be considered.

1. The Time of the granting, &c. thereof.
2. The Number of *Tales*.
3. The Order of them.
4. The Manner of Trial; that is, where by them with others, and where by them only.
5. The Quality of them is to be considered.

As to the first, four Things are likewise to be considered.

At *Wickham*
Assizes in
Bucks, 1684.
Only one Ju-
ror appeared,
who was
challenged,
but before he
was set aside,
the Court
granted a *Tales*
by *Mountague*
Chief Baron.

1. That the Time of granting them is upon Default of so many of the principal Panel, that there cannot be a full Inquest.
2. That at the Time of granting them, the principal Array stand; for *Tales* are Words similitudinary, and have Reference to the Assize, which then ought to be *in esse*; and therefore if the Array be quashed, or all the Polls challenged and treited, no *Tales* shall be awarded, for then there are not *Quales*; but in such a Case, a new *Venire facias* shall be awarded. But if at the Time of granting the *Tales*, the principal Panel stand, and afterwards is quashed, as aforesaid, yet the *Tales* shall stand; for it sufficeth if there were *Quales*, at the Time of granting the *Tales*.
3. It is to be observed, That he which is meerly Defendant, cannot pray a *Tales* till the Plaintiff hath made Default.

4. In

4. In some Cases a *Tales* shall be granted after a full Jury appear and is sworn; as if a Jury be changed, and afterwards before a Verdict given in Court, one of them die, a *Tales* shall be awarded, and no new *Venire facias*: and so if any of the Jurors impanelled die before they appear, and this appears by the Sheriff's Return, the Panel shall not abate, but if there be need, a *Tales* shall be awarded. And the Time for Challenge and Trial of the *Tales*, is after the principal Panel be tried; and if the principal Panel be affirmed, the same Tryors shall try the *Tales*; but if it be quashed, then the two Tryors of the Principal shall not try the *Tales*.

As to the second, to wit the Number, two Things are to be observed.

1. That in all Cases, the *Tales* ought to be under the Number of the Principal in the *Venire facias* (unless in Appeals) as in Attaint, under twenty four; and in other Actions where the *Venire facias* is of twelve, under twelve. And the Reason wherefore more than the Number may be granted in Appeals of the Plaintiff's Part, is because the Defendant may challenge peremptorily; and if Default be in the Plaintiff, then the Defendant may pray a *Tales*, and the Reason is *in favorem vite*, and that he may expedite and free himself from Vexation, and the Question of his Life, for fear that his Witnesses should die.

2. That the Number ought always to be certain, as ten, eight, six or four, &c. But now by the Statute of 35 H. 8. a *Tales de circumstantibus* may be granted, as well of an uncertain as a certain Number, and that by Force of these Words in the Statute

35 H.

35 H. 8. So many, &c. as shall make a full Jury.

As to the third, to wit, the Order, it is to be known, That always in every new *Tales*, the Number shall be diminished, as if the first be ten, the second shall be eight, and so always less. But if the *Tales* awarded be quashed by Challenge, you may have another of the same Number.

As to the fourth, to wit, the Manner of Trial, that is commonly by them with others; but by them only, when after the granting the *Tales*, the principal Panel is quashed, then the Trial shall be only by the *Tales*, or if the *Tales* do not amount to a full Inquest, another *Tales* to supply the former may be granted.

Therefore if the *Venire facias* be not de *medietat. lingue*, the *Tales* cannot.

3 E 4. 12.

As to the fifth, to wit, the Quality of the *Tales*, they ought to be of the same Quality as the *Quales* are; and therefore if the first be *per medietatem Linguae*, of English and Aliens, so ought the *Tales* to be; so if the Principal be out of a Franchise; so if the *Venire facias* be directed to the Coroners, so ought the *Tales*; and all Things which are required by Law in the *Quales* are required in the *Tales*, as you may read in the aforesaid Statutes, *vide Staundf. Ples del Corone. f. 155.*

Where a Juror is withdrawn, when the Plaintiff intends to bring the Cause to Trial again, he may have a *Distringas*, &c. with a *decem Tales*.

Attaint.

By the Statute of 23 H. 8. cap. 3. If there be not enough sufficient Freeholders as are required in an Attaint, in the County where such Attaint is taken, a *Tales* may be awarded into the Shire next adjoining.

If

If the Transcript of the Record of the *Nisi prius* be mistaken, and not warranted by the Rolls, for which Cause the Plaintiff becomes Nonfuit, he may have a *Distingas de novo*, upon Motion to the Court, and the *Postea* shall not be recorded, *Cro.* 1 Part, 204. *Palmer's Reports* 378. For there is but a Transcript of the Record sent to the Justices of *Nisi prius*.

First they were Justices of Assize, and therefore they retain that Name still, though Assizes are very rarely brought; for this common Action of Ejectment hath ejected most real Actions, and so the Assize is almost out of Use.

It shall be lawful to return Persons upon the *Tales* within any County of *England*, who shall have 5 *l.* per Annum above Reprizes; and in *Wales* 3 *l.* per Annum, 4 & 5 *W. & M. c.* 24.

Where there shall be Occasion for any *Tales*, the Sheriff or other Minister to whom it shall appertain to return the *Tales Men*, shall return Freeholders or Copyholders of the County where the Cause is to be tried, who shall be returned upon some other Panel to serve at the same Assizes, and then attending to serve upon such *Tales*; and the Plaintiff or Defendant may have his Challenge to the Jurors so named, in such Manner as if they had been impanelled upon the *Venire*: And the Judge of Assize shall, and may proceed to try the Issue with these *Tales Men* so newly added; as he might have done if all the Jurors returned on the *Venire*, had appear'd: And in Case any Freeholder or Copyholder so returned on the *Tales*, being present at such Return, shall refuse to appear when call'd; or after Appearance shall wilfully withdraw himself, the Judge

Nisi prius amendable.

Justices of *Nisi prius*, and Justices of Assize.

Tales Men their sufficiency.

Tales Men to be returned out of other Panels.

Challenge to the *Tales*.

Person on the *Tales* withdrawing himself, to be fined.

Judge of Assize who awarded such *Tales* may fine him, 7 & 8 W. 3. cap. 32.

Distingas
with a Blank
for the Cause
of Action,
amendable.

Authority of
a Judge of
Nisi prius is
by Commis-
sion of Assize.

Bullock versus *Parsons*. Pasf. 4 Ann. B. R. In Debt, after Verdict for the Plaintiff, Mr. Eyre moved in Arrest of Judgment, that the *Distingas* was with a Blank, and *Debiti* (the Cause of Action) omitted; so it was a *Distingas* in another Cause: On the other Side it was urged to be as no *Distingas*, and aided by Verdict; and that it was amendable, *Hob.* 246. 2 Cro. 528. The Court made two Questions, first, Whether the Judge of *Nisi prius* had Authority to try this Issue? *Et per Holt* Ch. J. The Authority of the Judge of *Nisi prius* is not by the *Distingas*, but by the Commission of Assize; for it is 13 E. 1. c. 30. which gives the Trial by *Nisi prius*, and by that Statute the Trial by *Nisi prius* is given before the Justices of Assize; and at first these Trials by *Nisi prius* were always had and made upon the *Venire facias*; and indeed the Clause of the *Nisi prius* is by 13 E. 1. c. 30. expressly ordered to be inserted in the *Venire facias*; and Trials by *Nisi prius* continued to be upon the *Venire facias* till 42 Ed. 3. c. 11. which requires that the Names of the Jurors be first returned into Court. By this Act two Inconveniencies were remedied; 1st, The Party might now be prepared to make his Challenges, the Panel being first returned into Court, which was not before. 2dly, The Defendant was prevented by this Means to cast an Effoin at *Nisi prius*, which was used frequently before; for by *Marlb. c. 13.* the Defendant was allowed one Effoin, and that after Issue joined upon the Return of the *Venire*: By Consequence, when that was returned at *Nisi prius*, he

he could essoin at *Nisi prius*; but now it is returned above, he must essoin above, and cannot now essoin at the Trial, because the Trial is upon the *Distingas* and not upon the *Venire*. 2dly, The Court held no *Distingas*, or the Want of a *Distingas* to be aided by Verdict, but an ill *Distingas* was not; and remembered a Case, wherein *Saunders* of Counsel at the Bar, dropped the *Distingas* out of his Hand, that he might want a *Distingas*, which would be aided, and not keep and shew an ill one, which would be naught. Also they held it amendable, and gave Judgment *pro Quer'*, *Salkeld* 454.

Where there is no *Distingas*, 'tis aided by Verdict, but an ill *Distingas* is not.

Greeves versus *Rolls*. *Pasf.* 4 *Ann. B. R.* The Judge of *Nisi prius* may receive a *Non Prof.* at the Assizes; so it was held by two Judges, and that Judgment was affirmed in the House of Lords against the Opinion of *Holt* Ch. J. For before Statute of *York*, the Justices of *Nisi prius* had no Power to record a Nonsuit or Default in the Country, and consequently have no Power now to enter a *Non Prof.* which is not within that Statute. At Common Law they could not record a *Non Prof.* Default or Nonsuit. *Nota*, The principal Case was, Ejectment against several, who all entered into the Rule of Lease, Entry and Ouster; at the Assizes some would confess, and others would not: The Plaintiff, as to those who would not confess, entered a *Non Prof.* and went on against the others, and recovered; upon this a Rule was made, That in like Cases the Plaintiff should go on against those who would confess, and as to those who would not, should be nonsuit; but that the Cause of the Nonsuit should be expressed in the Record, *viz.* because those Defendants would

Judge of *Nisi prius* may receive a *Non Prof.* at the Assizes.

In Ejectment against several, if some confess Lease, Entry, &c. and others do not, the Plaintiff may go on as to the former, and be nonsuit as not to the latter.

not confess Lease, Entry and Ouster; and upon the Return of the *Postea*, the Court would be informed what Lands were in the Possession of those Defendants, that the Judgment might be entered against the casual Ejector as to them, *Salkeld* 456, 457.

Where Defendants sever in Plea, Plaintiff may enter a *Non Prof.* against one any Time before the Record sent down.

It was agreed in the arguing of this Cause, That where there are several Defendants, and they sever in Plea, whereupon Issue is joined, that the Plaintiff may enter a *Non Prof.* as to one Defendant at any Time before the Record is sent down to be tried at *Nisi prius*. *Ibid.*

No Repleader awarded after Default at *Nisi prius*.

Staple versus Hayden. Trin. 2 Ann. Where the Defendant makes Default at *Nisi prius*, no Judgment can be given for him, nor Repleader awarded: If the Tenant make Default in a real Action, a *Grand Cape* is awarded; and upon the Return of it, if the Demandant insists upon the Default, he must have Judgment final; but the Demandant may waive the Default, and take an Appearance upon the *Grand Cape*, and that is regular, because the Tenant comes in by Process: And so it is of a Default on a *Petit Cape*, but in a personal Action there is no Process to bring the Party into Court again: Also the Day of *Nisi prius* not being the same with the Day in Bank, a Default at *Nisi prius* cannot be waived at the Day in Bank; and the Bar was cautioned never to make Defaults at *Nisi prius*, because no Judgment could be given for the Defendants afterwards, *Salkeld* 216, 217.

Default may be waived in real Actions, not in personal.

C H A P. VI.

Of the Number of the Jurors, and why the Sheriff returns twenty-four, though the Venire Facias mentions but twelve: If he returns more or less, no Error, and of the Number Twelve. And when the Trial shall be per primer Jurors. And of Inquests of Office; and when to remain pro defectu Juratorum.

NOW for the *Quales*; and these you see for Number must be Twelve, by the Common Law, *Doct. and Stud. fol. 14.* For Quality, *liberos & legales homines.* And first of their number Twelve: And this Number is *Of the num-* no less esteemed of by our Law than by Holy *ber Twelve.* Writ. If the twelve Apostles on their twelve Thrones, must try us in our eternal State, good Reason hath the Law to appoint the Number of Twelve to try our Temporal. The Tribes of *Israel* were Twelve, the Patriarchs *Josh. 4.* were Twelve, and Solomon's Officers were *Genes. 49.* Twelve, *1 Kings 4. 7.* *Vide Sir Henry Spelman,* *verb. (Jurata)* Therefore not only Matters of Fact were tried by Twelve, but of ancient Times, twelve Judges were to try Matter in Law, in the *Exchequer-Chamber*, and there were twelve Councillors of State for Matters of State; and he that wagemeth his Law, must *Plow. Com. in* have eleven others with him, which think he *proarmis.* says true. And the Law is so precise in this *Twelve* Number *Judges.*

Less than
twelve in In-
quests of Of-
fice.

Finch 400,
484.

Inquests of
Office. *Vide*
hic, cap. 13.

Number of Twelve, that if the Trial be by more or less, it is a Mistrial; but in Inquests of Office, as a Writ of Waste, there less than Twelve may serve. *F. N. B.* 107. c. And in Writs to enquire of Damages, the just Number of Twelve is not requisite, for they may be over or under; and so it was resolved, *Trin.* 1651. *B. R. Abbot versus Holt*, that the Sheriff ought (in Writs of Inquiry) to summon Twelve by their Names, yet Damages assessed by a less Number is sufficient, and in the Writ to the Sheriff, *quod ipse inquiret per Sacramentum proborum hominum*, omitting (*duodecim*) it's good and usual.

And in a Writ of Inquiry of Waste by thirteen it was holden good, 1 *Cro.* 414.

In Dower, if the Tenant come at the *Grand Cape*, and say he was always ready to render Dower, and Issue is taken upon this, although Seisin of the Land be presently awarded, yet no Inquest of Office, but the Jury upon the Trial of the Issue shall assess Damages, 22 *E.* 3. 15.

In what Cases there shall be an Inquest of Office, and in what not; see *Roll. tit. Trial*, 595.

Why the Sher-
riff returns
twenty-four.

And although there can be no Verdict but by Twelve, yet by ancient Course and Usage, (which as the Lord *Coke* tells you, makes the Law in this Case, 1 *Inst.* 155.) the Sheriff is to return twenty-four. And this is for Expedition of Justice; for if Twelve should only be returned, no Man should have a full Jury appear or sworn, in respect of Challenges, without a *Tales*, which should be a great Delay of Trials; and for this Cause at Common Law, 'twas Error if the Sheriff returned less

than

than twenty-four But now it is remedied by the Statute of 18 Eliz. as a Mis-return, see *Cro. 1 Part 223. Lib 5. 36, 37.* By which Books it appears, that if the Sheriff return but twenty three, &c. it shall not vitiate the Verdict of Twelve, no, though a full Jury do not appear, so that the Trial is by ten of the principal Panel, and two of the *Tales*, notwithstanding *Maynard's* Opinion to the contrary, and *Cro. 3 Part, 587.* The Sheriffs used to summon above twenty-four, *scil. effrænatam multitudinem*, but now they are prohibited by Statute to summon above twenty-four. *Westm. 2. cap. 38.*

If the Sheriff return less than twenty-four, it is no Error.

Keble, 1 Part, 310.

Must not return above twenty-four.

If the Issue be to be tried by two Counties, if but one of one County appear, although a full Inquest appear of the other, yet this shall remain for Default, because they cannot try that which is in another County.

In what Cases the Inquest shall remain for Default of Jurors.

There ought to be six of each County. And so of one Inquest out of a Franchise, and another out of the Guildable, and so of two Panels returned in an Assize by several Bailiffs of Franchises to try one Issue, and one Panel makes Default, the Issue shall not be tried by the other Panel, for the Jurors in one Franchise cannot make the View in another Franchise, *Roll. tit. Trial, 673.*

Two Counties.

If the Jury be of two Counties, or two Panels of the Guildable and Franchise, &c. they shall be sworn interchangeably first, one of one, then another of the other.

The manner of Swearing the Jurors.

If the Jury go at large until another Day after they are sworn, and the Roll of the Entry be not in Court, they may be sworn anew, *Roll. tit. Trial, 674.*

Where there must be 16 and 24 in a Jury.

To make a Jury in a Writ of Right, which is called the Grand Assize, there must be sixteen, *scil.* four Knights, and twelve others; the Jury in Attaint, called the Grand Jury, must be twenty-four, *Finch* 412, and 485. But if the Issue be upon a Matter out of the Point of the Attaint, as upon a Plea of *Non-tenure*, the Trial shall be by twelve *Juratores*. 21 E. 3. 13.

There may be more than sixteen in a Writ of Right, *Roll. tit. Trial*, 674.

Where Witnesses join with the Jury, the Number is uncertain.

When Process used to be made out against the Witnesses in *Carta nominat.* to join with the Jury in Trial of the Deed, as was used before the Statute of 12 E. 3. c. 2. (*his Testibns*) being then part of the Deed, then the Number was uncertain, according as the Number of Witnesses were in the Deed: Wherefore no Attaint lay, if the Deed were affirmed, because more than Twelve joined in the Verdict. But otherwise if the Deed was not found, because Witnesses cannot prove a Negative. *F. N. B.* 106. b. 1 *Inst.* 6. 2 *Inst.* 130, &c.

Juror departs and another sworn by Consent.

If Twelve are sworn, and one of them departs by Consent, another of the Panel may be sworn, and join with the other Eleven in the Verdict, 11 H. 6. 13.

A Jury of Six.

In Error upon a Judgment in *Cornwal*, because the Trial was but by Six, adjudged that it was erroneous, though it was returned *secundum consuetudinem ibidem ante*, &c. for such Customs are against Law, unless in *Wales*, which are permitted by Act of Parliament. *Cro.* 1 Part, 259.

Per primer Jurors See *hic* cap. 4.

If the Record be pleaded in Bar of the Assize, and the Party that pleads says, the same
Te-

Tenements were put in View to the former Jurors: If the Plaintiff saith *nient comprise*, this shall be tried *per primer Jurors & auters*. 13 H. 4. 10.

So if the Tenant saith that these Lands are not the same Lands before recovered, this shall be tried *per primer Jurors & auters*, 22 Assize, 16. and so in a *Redisseisin*.

So in an Assize, if the Defendant plead a Recovery, *per View de Jurors* in another Assize, this shall not be tried by the Assize, but *per primer Jurors*, 13 H. 4. 10.

And if at the Return of the former Jurors and others, all the former Jurors appear, the Trial shall be by them only; but if any do not appear, they shall be supplied by the others, 40 Assize, 4.

In such Cases where the Plaintiff is not to recover the Land, nor to defeat the former Judgment, if *nient comprise* be pleaded upon a Recovery pleaded, this may be tried by other than the former Jurors, 1 H. 6. 5.

As in Trespass for Trees cut, the Defendant pleads that he recovered before in an Assize, the same Land where, &c. and cut, &c. The Plaintiff says this Land, where, &c. was not put in View, and so *nient comprise*. This shall not be tried by the first Jurors, but by others, because this Action doth not defeat the former Judgment, nor recover any Thing but Damages. Note, The Difference 1 H. 6. 5. Where the Trial shall be *per primer Jurors*, and where by them and *auters*, and where only *per auters*, see Roll. tit. Trial, 593.

This is where a Bailiff of a Tenant in an Assize pleadeth, &c. and loseth by the Assize, Certificate of and the Tenant himself hath a Release or Assize, what.

some other Discharge to plead, then he may by this means have the Parties and first Jurors to appear again, and if it be found, he that before recovered, shall lose the Land, and yield double Damages. *Terms of Law.*

**Must be
twelve Jurors
in a Writ of
Enquiry.**

A Judgment out of an inferior Court was reversed; because, being by Default, the Enquiry of Damages was only by two Jurors, and Custom alledged to warrant it; and it was resolved by the Court, That there cannot be less than Twelve, tho' the Writ of Enquiry saith only, *per Sacramentum proborum & legalium hominum*, and not *duodecim*, as in a *Venue*, 1 *Vent.* 113.

**Rules in stri-
king a Spe-
cial Jury.**

Trin. 8 *W.* 3. A Rule was made in *B. R.* That when the Master is to strike a Jury, he should give Notice to the Attorneys on both Sides to be present; and if one comes and the other does not, he that appears shall strike out Twelve, and the Master shall strike out other Twelve for him that is absent, *Salkeld* 405.

If it be not expressed in the Rule that the Master shall strike forty-eight, and each of the Parties shall strike out Twelve, the Master is to strike twenty-four; and the Parties have no Liberty to strike out any, *Ibid.*

C H A P. VII.

*Who may be Jurors, who not ; who exempted,
and of their Quality and Sufficiency.*

SO much for their Number, next their Jurors must Quality is to be considered; and for this ^{1^e Liberi.} the Writ informs you who they are to be, ^{Vide 2^a Inst.} ^{fol. 27.}
1. *Liberos*, that is, Freemen, not Villains or Aliens; and that not only Freemen, and not Bond; but also those that have such Freedom of Mind that they stand indifferent, without any Obligation of Affinity, Interest, or any other Relation whatsoever, to either Party: Fortescue, Sometimes the word *Probos* instead of *Liberos* is ^{cap. 25.} attributed to them; they are both good Epithetes for a Juror, but I esteem the first as most significant.

Error of a Judgment in the *Marshalsea*, the *Saunders a. Venire facias* being *Probos & Legales*, not saying ^{gainst Leek.} as the Register is, *Liberos homines, &c. sed non allocatur*, Judgment affirmed, *Keble* 1 Part, 563.

2. They ought to be *Legales*, not outlawed, ^{Legales.} nor such as have lost *Liberam Legem*, or become infamous, as Recreants, Persons attainted of Felony, false Verdict, Conspiracy, Perjury, Premunire, or Forgery upon the Statute of 5 *Eliz. cap. 14.* and not upon the Statute of 1 *H. 5. 3.* Not such as have had Judgment to lose their Ears, stand on the Pillory or Tumbrel, or have been stigmatized or branded, nor Infidels, neither can any such be Witnesses, 1 *Inst. 6.*

A Jury of
Women.

3. *Homines*; they ought to be Men, (yet there shall be a Jury of Women to try if a Woman be *Enseint*, upon the Writ *de ventre inspiciendo*.) But what kind of Men these ought to be, is worthy to be known. And for this some Men are exempted from serving in Juries, in respect of their Dignity, as Barons, and all above them in Degree. Many are

Exemption of
Juries.

Who are to
be exempted
from Juries.

exempted by the Writ *de non ponendis in Assisis*, *F. N. B.* 166. as aged Persons seventy Years old, and many others are exempted, as Clerks, Tenants in ancient Demesne, Ministers of the Forest, (out of the Forest) Coroners, Infants under the Age of fourteen Years, Officers of the Sheriff, sick decrepit Men, and such as are exempted by the King's Charter: Yet in a Grand Assize, Perambulation, Attaint, and some other Special Cases, such Men as are not exempted by reason of their Dignity, shall be forced to serve notwithstanding their Exemption in other Cases. See *Dalton's Office of Sheriffs*, fol. 121. 52 H. 3. cap. 14. 2 *Inst.* 127, 130, 378, 447, and 561. Counsellors, Attorneys, Clerks, and other Ministers of the King's Courts are not to serve on Juries; but I find one Jury made of Attorneys of the *Common Bench* and *Exchequer*, in a Case brought upon a Bill in the *Exchequer*, by Sir *Thomas Seton*, Justice, against *Luce C.* for calling of him Traitor in the Presence of the Treasurer and Barons of the *Exchequer*. And this Jury of Attorneys gave the Justice one hundred Marks Damages, 30 *Assise*, 19.

A Jury of
Attorneys.

The Court frequently order a Jury of Merchants to try Merchants Affairs.

If the Charter of Exemption be, that he shall not be but in *Furatis Assisis seu recognitionibus aliquibus*, yet this shall not excuse in a Writ of Right upon Trial of the Grand Assize, for he comes not in in this Case by such Process as in other Cases, but is chosen by the Oath of the four Chevaliers, and now he is in a manner Judge in this Case, 39 E. 3. 15.

In what Cases they shall be discharged by Charter.

Neither shall it exempt him in an Attaint, nor in a Grand Inquest, to inquire of Felonies, &c. because the Charter hath not this Clause, *Licet tangat nos & hæredes nostros*, 42 Ass. 5.

At the *Nisi prius* the Bailiffs of a Vill may shew a Charter, that to try Contracts, &c. within the Vill, the Inquest shall be all of Denizens without Foreigners, and this shall be allowed, and the Foreigners shall be ousted, 29 Ass. 15.

At what Time, and how the Charter shall be allowed.

So may the Burgeesses who are put upon a Jury out of the Borough, if they have such a Charter, 30 Ass. 1.

If a Man be impanelled of an Inquest and shew such Charter of Exemption of the same King in whose Time he shews it, this ought to be allowed without Writ, 39 E. 6. 15. Roll. ib. 633.

Allowed without Writ.

The King may grant one or two to be discharged of Juries, but not the whole Country, for by this Means there would be a Failer of Justice; but the Grant shall not exempt any from serving in the *King's Bench*, without expresse Words.

The Jurors ought to come in Person and claim Privilege, the Sheriff cannot return it.

4. *De vicinet. de C.* It is not sufficient that they dwell in the County, but they are to be

Vifne.

of the Neighbourhood, nay *le plus prochains* to the Place of the Fact, as by *Artic. super cap. 9.* it is appointed: They must be most near, most sufficient, and least suspicious, *ib.* as I shall shew hereafter.

Sufficiency of Jurors.

5. *Quorum quilibet habeat quatuor libras terræ, tenement. vel reddit. per Annum ad minus*; this is their Sufficiency, where the Debt or Damages (or both together, 1 *Inst.* 272.) amount to forty Marks, or above. This Sufficiency of Jurors in other Cases of lesser Moment, is still left to the Discretion of the Justices, *For-tescue, cap. 25.* who (Experience tells us) never require Jurors under 4 *l. per Annum*, according to the Statute of 27 *Eliz. cap. 6.* before which, Men of 40 *s. per Annum* served; but neither this, nor the Statute of 35 *H. 8.* extend to Juries in Cities, Towns Corporate, or other privileged Places, or in the twelve Shires of *Wales*; so that there they shall be returned, as before they lawfully might have been. For the Jurors Sufficiency in Attaints, see the Statutes 15 *H. 6. 5.* 18 *H. 6. 2.* and 18 *H. 8. 3.*

As to the Statute 35 *H. 8. 6.* the Trial ordained by that Statute, lies only in such Actions, which have their ordinary Trial by twelve Men, and not more; and by Writ of *Nisi prius*; and this only in those Actions in which the Process of *Venire facias*, *Habeas Corpora* and *Distringas* lies against the Jurors, and in no other Actions.

And although the Statute only mentions the Trial of Issues joined in the King's Courts, commonly holden at *Westminster*, and if the Action be commenced in any other Court, yet if the Issue be joined in any of the Courts at *Westminster*, it shall be tried according

cording to the said Statute; and so if those Courts are removed from *Westminster*, the Issues joined in them shall be tried as the said Statute directs.

And the Words, *betwixt Party and Party*, shall only be intended of common Persons, and not betwixt the King and any other Person, nor when the King joins with any other Person, in any Action which by the Release or Pardon may be discharged before the Action brought.

In an Information of Intrusion by the Queen, a Juror was challenged for Insufficiency of Freehold; he had but to the Value of 15 s. a Year. It was adjudged that the Statutes *H. 5. 27 Eliz. &c.* extend only betwixt Party and Party, and not to the Queen, and if he had any Freehold, it was sufficient, but some Freehold he must have, *Cro. Eliz. 38, 413. Sir Christopher Blunt's Case.*

Which is necessary to be known, in respect of *Tales de circumstantibus, &c.* See *Williams* his Readings upon this Statute lately come out in Print; in which there are many ingenious Speculations, but because they do not come often in Practice, and the Project of this Treatise is only to contain Matters useful for Practisers; that the Book may not swell too big, I omit them, referring you to the Reading it self. See afterwards in the Chapter of Challenges.

It is the general Course of the World to esteem Men according to their Estates; for *Quantum quisque sua nummorum servat in arca, Tantum habet & fidei*: And sure I am, the Makers of this Law had Cause enough to do so in this Case; for if Men of less Estates should serve in Juries, such Fellows would only

Jurors of
above 4 *l.*
per Annum.

ly be shifted into Inquests as had more need to be relieved by the 8 *d.* than Discretion to sift out the Truth of the Fact: 'Tis hard to get an unbiassed Jury now; but surely less Rewards would sooner bribe and byass meaner Men, than these. Therefore, lest Poverty or Necessity should tempt, every Juror must have 4 *l. per Annum*, as aforesaid, of Freehold, out of ancient Demesne. And the Court may, in Matters of great Consequence, direct a *Venire facias* for a Jury above 4 *l. per Annum* a-piece, but not under, *Cro. 2 Part, 672.* But in such Cases (every one knows) the Court commonly orders the Prothonotary to chuse forty-eight, out of the Sheriff's Book of Freeholders, of the most substantial Men in the County, and the Parties strike out twelve a-piece, then the Sheriff returns the rest.

Jurors of 20 *l.*
per Annum.

Note, In former Times, when Estates of Inheritance were in few Men's Hands, such as had 40 *s. per Annum*, were found sufficient Men to serve on Juries. After, Estates of Inheritance coming in greater Measure to the Vulgar, it was by the said Statute 27 *Eliz. cap. 6.* made 4 *l. per Annum*, and the same Reason improving in late Times, it was thought consisting with the Wisdom of a Parliament to raise it to 20 *l. per Annum*, to the end Men's Estates might be trusted in the Judgment of more knowing Judges of Fact, when they become litigious; and this was by an Act of 16 & 17 *Car. 2. cap. 3.* which being but a Probationer, and to continue but for three Years, and from thence to the end of the next Session of Parliament, it is expired; but for that it may be revived, as I humbly judge

judge it expedient, I have thought fit to hint thus much concerning it.

Such a Man who hath Land, Rent, Office, or other Profit *apprender*, out of ancient Demesne, to the clear yearly Value of 4 *l.* of which he may have an Assize, he hath sufficient Freehold to be a Juror. *Vide* the said Reading, where you may know what Estate is sufficient to make a Man a Juror. See *hic* in the Chapter of Challenges.

But now by the Statute 4 & 5 Will. & Mariae, all Jurors (other than Strangers, *per medietat. linguæ*) returned upon Trial of Issues joined in the King's Bench, Common Pleas or Exchequer, or before Justices of Assize or *Nisi prius*, Oyer and Terminer, Gaol-Delivery, or general Quarter-Sessions of the Peace, shall have in their own Name, or in Trust within the same County, 10 *l.* a Year, above Reprises, of Freehold or Copyhold Land, or in ancient Demesne, or in Rents in Fee-simple, Fee-tail, or for their own or some other Person's Life; and in Wales 6 *l.* a Year. If any be returned of lesser Estate, he may be discharged by Challenge, or upon his Oath; nor shall a Juror's Issues be saved, but by Order of Court, for reasonable Cause proved upon Oath.

The Sheriff, Coroner, or other Minister returning any Person of lesser Estate, shall forfeit 5 *l.* to their Majesties, for every Person so returned.

They must be summoned six Days before the Day of their Appearance, and none to take a Reward to excuse a Juror's Appearance, on pain to forfeit 10 *l.* to their Majesties.

This Act extends not to Cities, Boroughs, and Towns-Corporate.

Tales

Tales Men in England shall have 5 l. a Year, in *Wales* 3 l. a Year.

No Fee or Reward shall be taken by any Persons whatsoever, upon the Account of any *Tales* returned, upon Pain of 10 l. The one Moiety to the Prosecutor, the other to his Majesty.

No Writ *de non ponendis in Assisis & Furatis* shall be granted, unless upon Oath that the Suggestions are true.

This Act to be in Force three Years, from the first of May 1693.

Jurors must not be of Affinity to the Party.

Et qui nec D. E. nec F. G. aliqua affinitate attingunt; the Law is very cautelous, in not leading Men into Temptation: Therefore, lest Kindred and Affinity should wrong the Conscience to help a Friend, our *Jurors* must not be related to any of the Parties; and for this Reason likewise the Statutes provide, that no Man of Law shall ride Judge of Assize or Gaol-Delivery in his own Country, 8 R.2. 2. 33 H.8. cap. 24. Yet the contrary hereof is often done by a *non obstante*; but how consistent with Integrity or Prudence, they know best who procure it to be done. But because most Things concerning the Quality and Sufficiency of Jurors, will come more properly under the Title *Challenge*, I will refer you thither and first observe more particularly, *De quo vicino* the Jury ought to come.

Jurors in Corporate Towns need not have Freehold.

Rex versus Higgins, B. R. The Cause came to be tried at Bar, and a Challenge was made to the Jury in Behalf of the Defendants, for that the Jury-men were not Freeholders: And the Court said it had been held, That for Juries within Corporate Towns, the Statutes that have been made, requiring that Jury-men should have so much Freehold, do not extend

extend to them; and tho' to maintain the Challenge, it was said by the Common Law that Jury-men were to be Freeholders. The Court over-ru'd the Challenge, 1 *Vent.* 366.

If in a Writ of Waste, the Defendant plead no Waste done, and it appears upon Examination upon a *Voir dire*, That six of the Jury have view'd the Place wasted, it is sufficient; if it appears upon Examination that none of the Jurors have had the View, the Trial shall be stay'd: If Waste be assign'd in several Places, and of any of them the Jury have not had the View, they may find *Nul Waste fait*, *Lutwich* 1558, 1559.

In Waste the Jury shall have the View.

A Grant from the King to discharge one from serving on Juries is good, but a Grant to discharge a whole Country is void, 1 *Siderfin*, 127.

King may exempt Persons from serving on Juries.

Rex versus Paine: The Court held, it was not in the Power of the Grand-Jury to find one guilty of Manslaughter on an Indictment of Murder, *Sid.* 230.

Grand-Jury must find pursuant to the Indictment.

Rex versus Percival & al. It was there held, That the King might grant the Privilege to a City, That they should be exempt from serving on Juries out of their own City. But it was agreed by all, That by such Grant they would not be exempt from serving in this Court *B. R.* unless there were an express Clause in the Charter, that they should not serve *coram ipso Rege*, *Sid.* 243.

A whole City may be exempted from serving on Juries.

Every Person using and exercising the Art of an Apothecary in the City of *London*, or within seven Miles thereof, being free of the Society of Apothecaries in the said City, and who shall have been duly examined and approv'd, &c. for so long Time as he shall exercise the said Mystery, and no longer, shall be exempted

Apothecaries exempted.

exempted from serving on any Jury or Inquest, 6 W. 3. cap. 4.

Other Persons exercising the said Art of an Apothecary in any other Parts of this Kingdom, who have serv'd as Apprentices seven Years, according to the Statute of 5 El. shall likewise be exempted from serving on Juries, for so long Time as they shall use and exercise the said Art, unless such Person voluntarily consent to serve, *ibid.*

Seamen exempted.

All Seamen also duly registred are exempted from serving on Juries by 7 & 8 W. 3. cap. 21.

Lists of Jurors to be exhibited by the Constables, to the Justices at their Quarter-Sessions.

All Constables and Headboroughs shall yearly at the General Quarter-Sessions of the Peace, in the *Week* after *Michaelmas*, return and give a true List in Writing of the Names and Abodes of all Persons within the respective Places for which they serve, qualified to serve on Juries, between the Age of twenty-one and seventy Years, which List they shall deliver to the Justices: And they shall cause the Clerk of the Peace, to deliver a Duplicate thereof to the Sheriff of the County or his Deputy, before the first of *January* next following, and cause the said List to be fairly entred in a Book, and kept among the Records of the Sessions: And no Sheriff shall impanel or return any Person to serve on any Jury at the Assizes, Gaol-Delivery, or Sessions of the Peace, who shall not be named in the said List. Any Constable or Headborough failing to make such Return as aforesaid, to forfeit 5 l. to the King, 7 & 8 W. 3. cap. 32.

No other to be returned by the Sheriff.

How to be summoned.

Every Summons of Persons qualified to serve on Juries, shall be made by the Sheriff or his Officer, at least six Days before the Day of Appearance, shewing to the Person the Warrant under the Seal of the Office, wherein

wherein he is nominated to serve ; and in Case such Juror to be summoned, be absent from his usual Habitation, a Note in Writing under the Hand of such Officer to that Effect, shall be left at his Dwelling-house with some Person there inhabiting, *ibid.*

The Return to the Sessions shall be a good Excuse to the Sheriff, if he summon one who is not qualify'd, and if an Action be brought thereupon, the Sheriff may plead the General Issue, and give this Act in Evidence ; and if the Plaintiff be nonsuit, &c. he shall pay treble Costs. And if the Sheriff, his Bailiff or Deputy, shall summon any Freeholder or Copyholder otherwise then as aforesaid, or neglect his or their Duty, or excuse any Person for Favour or Reward, or allow of any Exemption to any Person under the Age of seventy Years ; such Sheriff, his Deputy or Bailiff, shall forfeit the Sum of 20 l. to the Party grieved, or to whomsoever shall sue for the same, in any Court of Record at *Westminster*, *ibid.*

The Sheriff is excusable if he return any in the Constables Lists, though not qualified.

Penalty of Sheriff on his Misbehaviour.

Quakers are incapable of serving on Juries, 7 & 8 W. 3. cap. 34.

The Courts of *Westminster* are impowered to Order special Writs of *Distringas* or *Habeas Corpora*, to cause six or more of the first twelve Jurors, to have the Matters in Question shewn them, by two Persons in the Writs named and appointed by the Court ; and the Sheriff shall return the View, 4 & 5 A. cap. 16.

Special Writs where the Jury shall have the View.

C H A P. VIII.

Concerning the Visne, or Place from whence the Jury shall come, &c.

Visne.

Vicinetum is derived of this Word *Vicinus*, and signifieth Neighbourhood, or a Place near at hand, or a Neighbour Place, where the Question about the Fact is moved. And the most general Rule (saith Coke, 1 Inst. 125.) is, That every Trial shall be out of that Town, Parish or Hamlet, or Place known out of the Town, &c. within the Record, within which the Matter of Fact issuable is alledged, which is most certain and nearest thereunto, the Inhabitants whereof may have the better and more certain Knowledge of the Fact.

And if a Thing be alledged in *D.* the *Venue* must not be of *D.* but *de vicineto de D.* for otherwise the Neighbourhood would be excluded, *Roll. tit. Trial, 622.*

Parish.

And if the Fact be alledged in *quadam platea vocat. Kingstreet, in parochia sanctæ Margaretæ in Civitate Westm. in Com. Midd.* In this Case the *Visne* cannot come out of *Platea*, because it is neither Town, Parish, Hamlet, nor Place out of the Neighbourhood, whereof a Jury may come by Law; but in this Case it shall not come out of *Westminster*, but out of the Parish of *St. Margaret*, because this is the most certain. But therein also it is to be noted, that if it had been alledged in *Kingstreet*, in the Parish of *St. Margaret* in the County

County of *Middlesex*, then should it have come out of *Kingstreet*; for then should *Kingstreet* have been esteemed in Law a Town: For whensoever a Place is alledged generally in Pleading (without some Addition to declare the contrary, as in this Case it is) it shall be taken for a Town.

Towns

And albeit *Parochia* generally alledged, is a Place incertain, and may (as we see by Experience) include divers Towns; yet if a Matter be alledged in *Parochia*, it shall be intended in Law, that it containeth no more Towns than one, unless the Party do shew the contrary, But when a Parish is alledged within a City, there without Question the *Visne* shall come out of the Parish, for that is more certain than the City.

Parochia.

Moor 559

If a Matter be pleaded done *apud Bradford* in *Forfield* in *Parochia de Belbroughton*, the Venue shall be of *Belbroughton*, and not of *Bradford*; for *Belbroughton* shall be intended to be a Town, and one Town shall not be intended to be in another Town, and therefore *Bradford* shall not be intended to be a Town, Roll. tit. Trial, 619.

The Venue shall ever be of the most certain Place.

In a *Quo Warranto* for using a Warren in D. if the Defendant say the Vill D. is Parcel of the Manor of S. and prescribes to have a Warren within the said Manor and Demesnes thereof, the *Venire facias* shall be of the Manor; for the Manor by Intendment is more large than the Vill. If the *Visne* be de D. and S. and the *Venire facias* be de D. S. and V. this is not good, because it is too large. If *apud Burgum de Plimouth*, the Venue may be de *Plimouth* generally: If *apud Villam de Cambridge* in *Warda Fori*, and the *Venire facias* is de *Villa*

H

C

& *Warda prædict.* this is help'd by the Statute of *Feofails.*

If the Place be out of a Town, the *Venue* shall not be of the next Town, but from the Place it self, but the Sheriff ought to return the Jury, *de plus prochein Ville.*

In Ejectment of Land in *Foresta de Kewennon in Com.* the *Venue* may be *de vicineto Forestæ*, for this is a Place known; and by Intendment, because the Defendant hath not pleaded in Abatement, this is out of any Parish or Vill.

In inferior Courts within Boroughs, the *Venire facias* is *quod Venire facias 12 liberos Burghenses Burgi & Parochiæ de B.* although there may be twelve Burghesses which are not Inhabitants, *Roll. tit. Trial, 622. &c.*

The *Venue* shall follow the Issue. *Vide postea.*

In Trespass and Battery in *London*, if the Defendant justifie in *Midd.* by Process out of the *Marshal's Court*, that he arrested him, and because the Plaintiff would not go with him, he beat him, &c. *Absque hoc* that he is guilty in *London vel alibi*, out of the Jurisdiction of the Court. To which the Plaintiff replies, and acknowledges the Arrest, but says, that he beat him at *London*, *de injuria sua propria absque tali causa*, and Issue upon this, this shall be tried in *London*, and the Words *absque tali causa*, are void, the Issue being joined upon a Place certain, *scil. London*: Affirmed in a Writ of Error, *Roll. ib. 624.* But the Court said, that he might have demurred upon this Plea.

*De Corpore
Comitatus.*

Manor.

If a Trespass be alledged in *D.* and *nul tiel Ville* is pleaded, the Jury shall come *de Corpore Comitatus.* But if it be alledged in *S.* and *D.* and *nul tiel Ville de D.* is pleaded, the Jury shall come out *de vicineto de S.* for that is the more

more certain. So if a Matter be alledged within a Manor, the Jury shall come *de vicineto Manerii*. But if the Manor be alledged within a Town, it shall come out of the Town, because that is most certain, for the Manor may extend into divers Towns. And all these Points were resolved by all the Judges of *England*, upon Conference between them, in the Case of *John Arundel Esq;* indicted for the Death of *William Parker*.

Where there may be a special *Visne*, the Trial shall never be *de Corpore Comitatus*, *Leon. Com.* 1 Part, 109.

If a *Venire facias* ought to be of one or more Vills in certain, in a County, and this is awarded *de Corpore Comitatus*; this seems to be aided by the Statute of 21 *Jac.* of *Jeofails*; for this comes from the Vills from whence it ought to come, and from others, inasmuch as it comes *de Corpore Comitatus*, *Roll. tit. Trial*, 618. and many other Cases concerning this Matter.

But in Ejectment of Land, called *S.* and no Place is named where the Land lies, and a *Venire* is awarded *de Corpore Com.* this is erroneous, and too large, because there is a Place certain where the Land lies, and yet is not named in the *Nar.* as it ought to be, *Hob.* 121.

But if the Issue be taken upon a Title of Dignity, as whether *Chivaler* or not, this may come *de Corpore Comitatus*, because that the *lieu lou, &c.* is not material, *ib.*

If *A.* by the Name of *A.* of the County of *Hampshire*, bring a *Scire facias* upon a Recognizance in *Chancery* in the County of *Middlesex* against *B.* And the Defendant plead that the Plaintiff is outlawed by the Name

of *A.* of the County of *Chester*; to which the Plaintiff replies, that he is not *una & eadem Persona*, this may be by the Body of the County of *Middlesex*, where the Writ is brought, *ibid.*

In a *Quare Impedit* for the Church *de Usselbee*, and the Defendant pleads that there is no such Church, the *Venue* shall not come *de Corpore Comitatus*, but *de vicineto de Usselbee*; for this is a Place known, and it is intended the Church of *Usselbee* is within the *Ville* of *Usselbee*, *Hob.* 325.

Wild.

In a Prohibition, if the Parties be at Issue upon a Custom *de non decimando* of Wood in the Wild of *Suffex*, the *Venire facias* shall be *de Corpore Comitatus*; for the Wild is not such a Place, whereof the Court may have Conu-
fance to be sufficient to have a Jury to come from this, for the Wild is a Wood by Intend-
ment, *Hob.* 348.

Heir tried
where the
Land lies,
where not.

Cro. 3 Part.
818. *Cro.*
2 Part. 303.

In a real Action where the Demandant de-
mands Lands in one County, as Heir to his
Father, and alledges his Birth in another
County, if it be denied that he is Heir,
it shall not be tried where the Birth is al-
ledged, but where the Land lieth; for there
the Law presumes it shall be best known who
is Heir. But if the Defendant make himself
Heir to a Woman (for that is the surer and
more certain Side, and the Mother is certain,
when perhaps the Father is incertain) and
therefore it shall be tried where the Birth
is alledged, because they have more certain
Conufance, than where the Land lieth.

Bastardy.

And so it is where Bastardy is alledged,
the Trial shall be in like Case, *Mutatis mu-
tandis.*

If

Ch. 8. *from whence the Jury shall come.*

101

If a Man plead the King's Letters Patent, *Non Concessit*, and the other Party plead *Non concessit*, it shall not be tried where the Letters bear Date; for they cannot be denied, but where the Land lieth. *where the Land lies.*

Every Trial must come out of the Neighbourhood of a Castle, Manor, Town or Hamlet, or Place known out of a Castle, Manor, Town or Hamlet, as some Forest, and the like, as before. *Visme, of what Places.*

Venire facias may be of a Forest, Burgo, Castro, Warda, Parco, &c. but not of a Leet, Baliva, Market, Walk, &c. nor *de lieu connus*, without alledging this to be out of a Vill or Parish, *Siderfin* 326. But after Verdict helped by the new Statute 16, 17 Car. 2. cap. 8.



Every Plea concerning the Person, Plaintiff, &c. shall be tried where the Writ is brought. *Where the Writ is brought at Common-Law.*

When the Matter alledged extendeth into a Place at the Common Law, and a Place within a Franchise, it shall be tried at the Common Law.

Matters done beyond Sea may be tried in England, and therefore a Bond made beyond Sea may be alledged to be made in any Place in England, if it bear Date in no Place; but if there be a Place, as at Bourdeaux in France, then it shall be alledged to be made *in quodam loco vocat. Bourdeaux in France*, in Islington in the County of Middlesex, and from thence shall come the Jury, 1 Inst. 261. Latch. 4, and 5. So if the Tenant plead that the Demandant is an Alien, born under the Obedience of the French King, and out of the Legiance of the King of England; the Demandant may reply, that he was born at such a Place in England, within the King's Legiance, and

Matters done beyond Sea, how triable in England. Vide cap. 10.

Kebble 2 Part, 315.

H 3

here-

hereupon a Jury of twelve Men shall be charged, and if they have sufficient Evidence that he was born in *France*, or in any other Place out of the Realm, then shall they find that he was born out of the King's Legiance. And if they have sufficient Evidence that he was born in *England*, or *Ireland*, or *Guernsey* or *Fersey*, or elsewhere within the King's Obedience, they shall find that he was born within the King's Legiance. And this hath ever been the Pleading and Manner of Trial in that Case. So of other Things done beyond Sea, the adverse Party may alledge them to be done at such a Place in *England*, from whence the Jury shall come, and in a special Verdict, they may find the Things done beyond Sea, *ib. Lib. 7. 26.*

Things done
beyond Sea.

Lib. 7. 26.

Part without
the Realm,
and Part
within.

So when Part of the Act is done in *England*, and Part out of the Realm, that Part that is to be performed out of the Realm, if Issue be taken thereupon, shall be tried here by twelve Men, and they shall come out of the Place where the Writ or Action is brought, *ib. Lib. 6. 48.*

Full age tried
where the
Land lies.

Error, for that Judgment was given by Default against the Defendant, being an Infant, Issue was taken that he was of full Age. And *Godfrey* moved, whether the Trial should be in *Norfolk* where the Land was, or in *Middlesex*, where the Action was brought? And the Court held, That it should be tried in the County where the Land lay; and *Tanfield* said, it was adjudged in the *King's Bench*, between *Throgmorton* and *Burfind*, Cro. 3 Part, 818.

Where the
Land doth
lie.

Questions of Title of Land (except by special Order of the Judges in some Cases) are to be tried in the County where the Land

Land lies ; for the Law is, that all real and mixt Actions, as Waste, Ejectment, &c. must be brought in the County where the Land is. But Debt, Detinue, Account, Actions of the Transitory Case, Battery, &c. are in their own Nature Actions. transitory, and yet they ought to be laid and tried in their proper County where the Fact was done, unless the Court order the contrary, for some special Reasons ; and if they are laid out of the proper County, daily Practice tells us the Court may alter the *Venue*, upon *Affidavit* of the true Place of the Fact.

All Criminal Matters are to be tried where the Offence is committed. Criminal Matters.

If the *Venue* arise in two Counties, the Jury upon two *Venire facias* shall come from both, six out of one County, and six from the other, *Cro. 3 Part, 646.* But by Consent of Parties, entred upon Record, it may be by five out of one, and seven from the other, as appears, *Cro. 3 Part, 471.* where in *Replevin*, the Defendant avows for *Damage feasant* ; the Plaintiff by his Replication, claims Common by Prescription *in loco quo*, &c. being *Broadway* in the County of *Worcester*, appurtenant to his Manor of *D.* in the County of *Gloucester*, and Issue thereupon, and two *Venire facias* awarded to the Sheriffs of the several Counties, and now seven of the County of *Worcester* appeared, and five of *Gloucester*. And although there ought to have been six sworn of each County, to try that Issue, as appears *49 Ed. 3. 1. 31 H. 8. 46.* yet by the Assent of Parties, those twelve who appeared, by the Advice of all the Justices, were sworn, and tried the Issue. And it was commanded, that this Assent should be entred upon Re-

This is called a Joinder of Counties. *Finch 410.* Jury out of two Counties.

But out of more than two Counties it cannot be made.

cord ; for otherwise it would be a strange Precedent.

In Affize of Common *in Confinio Comitatus*, and the Issue be, whether he had Common by Prescription in one County, appendant to a Manor in another County, this shall be tried by both Counties.

The same Law is in Trespass brought in one County, (which cannot be *in confinio*) upon such an Issue the Trial shall be *per ambideux* Counties, 49 E. 3. 20. See *Roll. tit. Trial*, 599, &c. many Cases where the Jury shall come from two Counties.

In an Action upon the Statute of *Marlebridge*, for taking a Distress in one County and chasing in another County ; upon not guilty, the Trial shall be only by the County where the chasing is, for this is all the Cause of the Action, 4 H. 6. 4.

Escape.

In Escape upon Arrest in one County, and an Escape in another County, upon not guilty, this shall be tried, where the Escape is laid, for the Action is upon the Escape, *Roll. ib.* 602.

Covenant in
P. to sell at R.
tried at P.

In an Action of *Trover*, *apud Paxton in Com. Hunt.* the Defendant pleads a Bargain and Sale, *apud Royston in Com. Hertford*, in the Market there, whereby he after converted them, *apud P. in Com. Hunt.* The Plaintiff saith, that he was possessed of those Goods, *apud P. in Com. Hunt.* and that J. S. there stole them from him, and by Covenant betwixt him and the Defendant, at *P. in Com. H.* he sold them to the Defendant, as he hath pleaded : The Issue was upon the Sale made by Covenant, &c. And it was tried in the County of *Hunt.* and found for the Plaintiff. And it was moved to be a Mis-trial ; for it ought to have been by a Jury of the County of *Hertford*, or at least-

least-wise by a Jury of both Counties : But it was adjudged to be well tried, because the Sale is confessed, and the Issue is upon the Covenant alledged in *Hertford, Cro. 3 Part, 511.*

In Debt upon a Bond in *London*, the Defendant pleaded an usurious Contract in the County of *Warwick* ; the Plaintiff replied, that the Bond was made upon good Consideration, *absque hoc* that it was made for such usurious Contract : The Trial shall be in the County of *Warwick* ; for the Bond is confessed, and the Usury in *Warwick* is only in Question ; so if the Issue be, whether the Deed were made by *Dures*, the Trial shall be where the *Dures*, and not where the Deed is supposed to be made, *Cro. 3 Part, 195.*

Usurious Contract in another County.

A *Dures* shall be tried there, not where the Action is brought.

Where Issue is taken upon a Surrender, it shall be tried where it was alledged to be done, and not where the Manor is, of which the Copyhold is holden, *ib. f. 260. Br. tit. Visne, 114.*

Surrender.

In an *Assumpsit* laid at *London*, in *Warda de Cheap*, the *Venire* was *de Parochia de Arcubus in Warda de Cheap*, whereas no Parish was mentioned before in the Count, and adjudged, that the *Venire* was ill laid in the Court, for a *Venire facias* may be of a Town, Parish, Manor, or other Place known, but not of a Hundred or Ward, *ib.* and so it is adjudged, *ib. Cro. 1 Part, 165.* for the Ward in a City, is but as the Hundred in a County. The Parish in *London* is in Lieu of a Vill, and the Ward of a Hundred, *Roll. tit. Trial, 620, 621, 622. vide hic apres.*

Ward or Hundred, no good *Visne.*

Where the *Visne* is laid to be at a City, in an Action brought in a superior Court, or within the City, though it be both a City and County, the *Venire facias* may be *de vicinet.*

Roll. 622,
623.

So in all in-
ferior Courts,
Style 2.
March 125.

London.

City.

Hundred.

Ward.

net. Civitatis, Latch 258. Though it hath been held not good, but that the *Venire facias* must be *de Civitate*, leaving out *Vicinet.* as you may read in Staundf. 155. But now the Case in Cro. 2 Part, 308. and Bulstr. 1 Part, 129. say, that all *Venire facias*'s are awarded *de vicinet. Civitatis*, which is intended as well *de Civitate* it self, as *de vicineto infra Jurisdictionem* of the City. And so it is *de vicinet. Civitatis*, or *de vicinet.* or *de Civitate* Coventry, Eborum, Norwich, Sarum, Bristol, Exon, and all other Cities which are Counties in themselves. In all Places besides London, no mention is made of the Parish or Ward, *ibid.* 493. But in London the Parish and Ward is mentioned, and therefore it was adjudged, Cro. 2 Part, 150. That it was not good to alledge any Thing done in London generally; but it must be in what Parish from which a *Venire* may be; but where a Thing is laid in a City, in *alta Warda* there, and the *Venire facias* is from the City only, it is well, because it shall be intended there be no more Wards in the same City, Cro. 3 Part, 282.

In an Action against the Hundred upon the Statute of Winton, &c. upon the Roll the *Venire facias* is awarded of Bradley, *quod est proximum Hundredum*, and the *Venire facias* is generally of Bradley. This is well, because by the Roll it appears that Bradley and the Hundred were all one, Roll. tit. Trial, 598.

If a Thing be laid done, *apud Bristol, viz. in Warda Sanctæ Mariæ in Warda de Ratliff*, and the *Venire facias* is *de Warda de Ratliff*, this is not good, *ib.* 619.

But if it be alledged in a Ward in the City of Bristol, &c. the *Venue* shall be of the Ward, not *de Civitate*.

A Ve-

A *Venire facias* was awarded from T. and not *De vicinet.*
de vicinet. de T. and for this Cause resolved to be ill, and not amendable, Cro. 2. Part, 399. left out, ill.
 Bro. tit. *ven. fac.* 8.

If the Issue be *si Rex concessit per literas patentes*, the Trial shall be, as hath been said, where the Land lies, and not where the Patent was made, because the Patent is of Record; and if it be traversed, it shall be tried by the Record, and therefore the Issue being upon *Non concessit*, the Issue is not upon the Patent; but where the Issue is upon *Non concessit*, or *Non dimisit*, of a Thing which passeth by Deed, the Trial shall be where the Grant or Demise is alledged: But of a Feoffment, or Lease for Life pleaded, the Issue being *Non feoffavit*, or *Non dimisit*, Livery ought to be made, and therefore the Trial shall be where the Land lies, Cro. 2 Part, 376. 3 Part, 269. Where the Land lies.

Where the Offence is laid in the Count to be in one County, and the Justification in another County, and the Plaintiff replies, *de injuria sua propria, &c.* The *Visne* shall be where the Justification is alledged; as, one Example for all, to illustrate. In an Action upon the Case, for Words supposed to be spoken at *Bridge-North*, in the County of *Salop*, the Defendant pleads, that he spake them as a Witness upon his Oath, upon an Issue tried at *Chard* in the County of *Somerset*. The Plaintiff replies, *de son tort demesne, &c.* And therefore it was tried by a *Venire facias* of *Bridge-North*, and Error thereof assigned, because it ought to have been by a *Visne* of *Chard*, where the Justification arose; and it was held clearly to be a Mis-trial, and not aided by the Statute of *Jeofails*; wherefore the Judgment Where the Action is laid in one County, and the Justification in another, the Trial shall be where the Justification is.

ment was reversed, *Cro.* 3 Part, 468, 261, 870. *Moor* 410.

Replevin, taking two Horses at such a Place in *Denford in Com. Northampton*; the Defendant makes Conusance as Bailiff to the Lord *Mountague*, of his Manor of *S.* which Manor is holden of the Honour of *Gloucester*, and that the Place in which, &c. is within the said Honour, and alledges a Custom within the said Honour, on which Custom the Parties were at Issue, and the *Venire facias* was from *Denford* the Place of taking, which was moved after Verdict, for that the *Venue* was not so large as the Issue, which was the Honour, and of this Opinion was the whole Court of *C. B. Pasch. 13 Car. 2. Hull* versus *Benning*.

Honours.

Siderfin 19, 88.

But the great Question was, whence the *Venue* should arise in this Case; and by *Bridgman* Chief Justice, and Justice *Hide*, in no Case can a *Venue* arise from an Honour; and the Chief Justice said, he had caused the Prothonotaries to search for Precedents, and they could not find that ever a *Venue* did arise from an Honour, which is a Bundle of Services, and an incorporeal Thing, from which no *Venue* can come; and yet an Honour may have Demesnes, as the Honours of *Grafton* and *Hampton* have, but *Gloucester* not.

Chief Justice and Justice *Hide* seemed to incline that the *Venue* should be *de Corpore Comitatus*. *Hob.* 266, 249. But when the Court was after moved for their Opinion, they bade them take a *Venire facias* at their Peril, and would give no Opinion.

An Action of Debt was brought on a Bond to perform Covenants in an Indenture, whereby the Defendant had granted to the Plaintiff

tiff a Walk called *Shrob-walk*, in the Forest of—— in Com. Northampton, and covenanted for peaceable Enjoyment, &c. and he was ousted *per* Earl of Northampton, who had Right, on which Right Issue was joined, and the *Venire facias* was from *Shrob-walk*.

Per Cur. It's not good, for it appears by the Record that *Shrob-walk* is not a Vill: But if the Obligation had been laid to be made at *Shrob-walk*, the *Venue* should arise from thence, as a Vill. *Inter Stirt and Bales, Pasch. 19 Car. 2. B. R.*

The *Venue* shall follow and be according to the Issue. Out of what Country.

As for Words in *Warwickshire*, *Thou art a Thief and stolest my Iron*: The Defendant justifies and says, the Plaintiff stole the Iron in *Leicestershire*, and brought it into *Warwickshire*, and therefore he spake the Words in *Warwickshire*. If the Plaintiff replies, *de injuria sua propria absque tali causa*, the Jury shall come from *Leicestershire*, to which the *absque tali causa* refers, for the Words are acknowledged, See *Roll. tit. Tryal, 598, 623.* *V. de hic ante & postea.*

When Part of the Matter to be inquired of, is in one County or Place, and Part in another, the Trial shall be there where the best Consuance of the Matter may be.

As in an Action upon the Case; the Plaintiff declares that the Defendant took the Horse of *A.* at *S.* and sold him at *D.* to the Plaintiff as his proper Horse, and afterwards *A.* retook the Horse. If the Defendant plead that the Property was in him at the Sale, upon which Issue is joined, the *Venue* shall be *de S.* where the taking is supposed, for there the Property may be best known, which is only in Question, 42 *Aff. 8.* See several Cases in *Roll. ib. 603.* From the Place best known.
under this Head. If

Where the
Counties can-
not join.

If the Issue be whether *L.* did ride from *London* to *York*, and from *York* to *London*, five Times in six Days, this may be tried by *London* only, although part of the Matter to be inquired of was done in each County.

In an Action of Battery in *London*, if the Defendant justifies in defence of his Possession in *D.* in *Essex*, and the Plaintiff says, *de son tort demesne sans tiel cause*, this ought to be tried by both Counties, if they might join, because he may be found guilty at another Day, and therefore because they may not join, this may be tried in *Essex*.

Of Assises in Confinio Com. see 1 Inst. 154.

Roll. tit. Trial,
620.

In Case for Words in one County, if the Defendant justify in another County, and the Plaintiff reply *de son tort demesne*, &c. although the Counties ought to join, if they could, and the Justification is principally put in Issue, yet the Trial may be in either County, at the Election of the Plaintiff.

London cannot
join with
another Coun-
ty 49 E. 3.
30.

In Ejectment in *London*, upon a Lease made there of Land in *Midd.* if the Defendant plead Not guilty, this may be tried in *London*; because the Counties cannot joyn, although the Jury ought to enquire of the Ejectment in *Midd.* and Judgment affirmed in a Writ of Error. See Roll. tit. Trial, 602.

Two Counties may join although they be not nearest, nay though twenty Counties be between them. Finch French. 59. 1 Inst. 154.

But if it be of a Lease at *Ickford* of Land in *Bury* in *Suffolk*, the Venue must be of *Bury*, not of *Ickford*. 619.

Where the
Writ is
brought.

If the Issue be taken upon the Name or Condition of the Person, this shall be tried in the County where the Writ is brought, 21 E.

4. 8. for this may be well known there. *Roll. ib. 615.*

Where the Issue is to be tried upon a Point which shall be tried by two Counties, and one cannot joyn with the other, this shall be tried where the Writ is brought. 21 E. 4. 8. But for this, see before where the Counties cannot joyn.

In Debt in *London*, against J. S. of D. in *Essex*, if the Defendant saith that he was at S. in *Essex*, at the time of purchasing the Writ, and not at D. this shall be tried in *Essex*, and not where the Writ is brought, for none can know where he dwelt so well as the County of *Essex*. 12. H. 6. 5.

Where in other County than where the Writ is brought.

Vide many Cases in *Roll. ib. 605. &c.* about this matter.

In an Action of the Case against a Sheriff, upon an Escape in *London*, and the Arrest laid to be in *Southampton*; adjudged, that the *Visne* shall be where the Escape was, because that is the ground of the Action, and not where the Arrest was. *Cro. 3 part, 271.*

Where the escape was, and not where the Arrest was.

Nota, In an Action of the Case for Deceit, or upon an Escape, the Court will not change the *Visne* out of the County where the Plaintiff supposes the thing to be done. *Siderfin 85.*

Deceit. Escape.

Nor in a *Scandalum Magnatum*, upon the common Affidavit. *ib. 185.*

Scandalum Magnatum.

Nor in Actions upon Penal Statutes, for they must be brought in their proper County. *ib. 287.*

Informations.

Nor where the cause of Action is in two Counties, and the Plaintiff laid his Action in one of them. *ib. 405.*

Two Counties.

If the Plaintiff will be bound to give no Evidence but what arises in the County, where he lays his Action, the Court will not change

the

the *Venue*, upon the common Affidavit, *ib.* 442.

Counsellor at Law, his *Venue* shall not be altered, because of his Attendance at the Court. *Modern Rep.* 84.

* *Reſtoræ.*

Castle.

Roll. tit. Trial,
621.

In Debt upon an Obligation, Payment was pleaded, *apud domum mansionalem Reſtoræ de Much-Hadam*, and the *Venire facias* was *de vicineto de Much-Hadam*, where it ought to have been *de vicinet.* *Reſtoræ de Much-Hadam*; but it was adjudged good, because *Much-Hadam* is here intended a Vill. 3 *Cro.* 804. So you see that where a thing is alledged to be done at the Capital House * of *D.* there the *Venire* shall be of *D.* for that is intended to be all one with the Vill. But where it is at the Castle of *Hertford*, &c. there the *Venire facias*, shall not be *de vicineto de Hertford*, but *de Caſtro de Hertford*, for *Caſtrum Hertford* is intended a distinct place by it self; and so of all Castles. *Cro.* 2 part, 239. *Moor* 286.

A *Venire facias* may be awarded of a Castle, *Roll.* 618.

Manor.

Roll. tit. Trial,
621.

Where the Issue is not parcel of the Manor of *D.* or the Custom of a Manor is in question, the *Venire* ought to be of the Manor. *Hob.* 284. *Cro.* 2 part, 327. If the Manor be laid to be in a Vill, the *Venire facias* may be of the Manor in the Vill, as *de vicineto manerii de Stansted-Hall in Windham.* *Cro.* 2 part. 405. *Moor* 581. *Arundel's Case*, li. 6. 14.

The *Venue* cannot be of a Scite of a Manor. *Roll. tit. Trial*, 618.

In the *Common-Bench*, in *Trespas*, for taking away a Bag of Pepper. The Defendant justified as Servant of the Mayor and Commonalty of *London*, for Wharfage due to them by the Custom of *London*, which the Plaintiff refused to Pay. The Plaintiff replied that the Custom

did not extend to him, because he was a Free-Man of the City, and ought not to pay Wharfage, to which the Defendant rejoined, that the Custom extended to him, as well as to Strangers; upon which Issue was joined.

Resolved, 1. That the Issue should be tried *per Pais*, not by the Mouth of the Recorder, because he certifies nothing but what the Mayor and Aldermen direct, who are concerned in the Cause. Recorder.

2. That the *Venire facias* shall not be awarded to the Sheriffs of London, or Middlesex, because the Trials there are by Free-Men. But it shall be to the County next adjoining, *viz.* to the Sheriff of Surrey. So where any City is concerned, the *Venire facias* shall not be directed to the Officers of the City, but to the County next adjoining, *Hob.* 85. *Style* 137. *Moor* 871. *vide hic cap.* 2. See *Hardres Reports*, f. 309. Good Learning concerning this matter. Where the Trial shall be by the County next adjoining.

If the Issue concern the Mayor and Commonalty of a Town, the *Array* shall be made all of Foreigners. 31 *Assise* 19. *vide Roll. tit. Trial*, 597.

So if the Issue concern the Mayor and Commonalty, &c. although they are not Parties, yet the *Venire facias* shall be directed to the Sheriff of the next County: 15. *E.* 4. 18. Information for Seizure.

See *Hardres Reports*, f. 16. &c. Good matter in an Information upon a Seizure in what place the *Visne* shall be, and the Entry and manner of quashing one *Venire facias*, and awarding a *Venire facias de novo*, &c.

Where a Man lends a Horse to another to till his Land, and the Horse dies with excessive Where a Man lends his Horse in one place, and he is spoiled in another, *Visne* where he is spoiled.

I

Labour,

Labour the *Visne*, shall be from the Place where the excessive Labour was, and not where the Delivery was; *Moor* 887. *vide Hob.* 183. *Roll. tit. Trial* 615. *Pasch.* 22 *Car.* 2. *B. R. Horsley versus Potter.* An Action of the Case was brought for misusing a Horse, *in Itinere*; the Contract was laid at *Swafham* in *Norfolk*, and the Riding to *Peterborough* in *Northamptonshire*, where the Horse died: It was tried in *Norfolk*; and the Court seemed that it ought to have been tried in *Northamptonshire*, where the Damage was done, and not where the Contract was made, but it was aided by the Statute of *Feofails*, 17 *Car.* 2 *cap.* 17. (after Verdict) that Statute being then in Force.

Promise in
one Place, and
Breach in
another.
Visne guided
by the Issue.

Modern Rep.
36, 37.

Misnomer.

Where the
Land lies.

Where a Promise is laid in one Place, and the Breach in another, the *Visne* must be according to the Event of the Issue, whether it be taken upon the Promise or Breach. But if no Place be alledged for the Breach, and Issue be taken upon it, the *Visne* must be from the Place of the Promise, which shall be intended right, where the contrary appears not. See *Godbolt* 274.

Easter 39 *Eliz.* In the *King's Bench*, *Trespass*, *Affault* and *Battery*, in *Wilts*, continuing the *Affault* in *Middlesex*, and adjudged that the *Furors* shall come out of both Counties. *Moor* 538.

The Name of a Manor, or Land, or other local Thing shall be tried where it lies, because it is local; but the Name or Addition of a Person, shall be tried where the Action is brought, because this is transitory. *Bro. tit. Visne*, 7. *lib.* 6. 65.

In Covenant upon an Indenture of Demise of the Rectory of *Stoken-Church* in the County of *Oxford*, That the Defendant had good Power and Authority to demise: The Indenture was alledged

alleged to be made at *London*, and the *Venire facias* was awarded to the Sheriff of *Oxon*, and this being assigned for Error, Judgment was affirmed, and this adjudged to be good. *Moor* 710. Because the Rectory was in *Comitat. Oxon.* *vide page 45.*

In Debt upon an Obligation in one County Where the to perform Covenants in a Lease, and the Land lies, Land and Payments were in another County; and not where the Trial shall be where the Land and Pay- the Writ, &c. ments are. 44 E. 3. 42.

In Debt upon a Lease in one County, and the Payment of the Rent upon the Lease limited there also, but the Land was in another County, and the Payment upon the Land; this shall be tried where the Land and Payment was, for he was bound to pay this there upon the Distress. *ib.*

But the Trial should have been where the Writ was brought, if the Payment had not been alleged to be where the Land was. *ibid.*

If Debt be brought for Rent upon a Lease Where the for Years, and the Action is brought where Land and the Land is, but the Deed of the Lease bears Writ, &c. date in another County, the Trial shall be where the Land and Writ is brought. 44. E. 3. 8 The Issue being whether the Lessor had a conditional Estate or not, and so a lawful Eviction.

If the Issue be in an Affise, whether the Where the Tenant be the eldest Son of J. S. and his Land lies, and Birth is alleged in another County, yet this where not. shall be tried where the Land is. 46. Aff. 5.

If an Infant bring an Affise, and a Release of his Ancestor is pleaded against him, dated in another County, this must be tried where the Release is dated, and not by the Affise, the

although the Plaintiff be an Infant, and the Circumstances are to be enquired. 21 E. 3. 20. See Roll. ib. 611.

Where from two places in one County. and where not. Vide cap. 10.

In Case, if the Plaintiff declare upon a Trust at *D.* and of a Wrong at *S.* Upon not guilty, if it appear the Trust is not material, the *Venue* shall only come from *S.* and not from both Places, one not being material.

In Case, for stopping a Way from such a Place to such a Place, and that the Obstruction was at *D.* Upon not guilty, the *Venue* shall not come from *D.* only, for all the Way is put in Issue.

The *Venire* as large as the *Nar.* and no *Venire* from two Vill.

If the *Nar.* be *apud A. in Com. B.* and the *Venire* is *de Vill. & paroch. de A.* 'tis ill. Yelv. 104. 2 Cro. 586.

When the *Venue* shall be from two Vill, 2 Cro. 599. Yelv. 26, 182, 187.

In Trespass in one Vill, and a Release pleaded in another Vill, within the same County, upon *non est factum*, this shall be tried *per ambideux*. Roll. ib. 624. Vide hic ante. See Roll. ib. 615. many Cases about this.

De Corpore Com.

Where the *Venue* cannot be from a Vill, Hamlet or *lieu connus*, there it may be *de Corpore Comitatus*, for if it might not be so, the Cause could not be tried.

A *lieu connus* is a Castle, Manor or other notorious Place well known, and generally taken Notice of by those who dwell about it, and not a Close or Pasture of Ground, or such like Place of no Repute.

A Custom of a County is to be tried *de Corpore Comitatus*, for the Custom runs through the whole County.

Parish.

Where the Parish is named by Way of Denotation, or Explanation of the Place, where the Fact is alledged to be done, as at the Parish

rish-Church of *Hink-bucknel*, there the *Venire facias* shall be of the Town, not of the Parish, *Bulstr.* 1 Part, 60, 61.

If the Fact be alledged in *King-street*, in the Town. Parish of *St. Margaret in Com. Midd.* you have already heard that the *Visne* shall be from *King-street*, because it is intended to be a Town; but where it is alledged to be done at *Grays-Inn Hall*, or *Lincoln's-Inn Hall*, &c. in *Inns of Court*. *Holborn*, the *Visne* shall be from *Holborn*, which is the Town; for as *Yelverton* said, it was never heard of any *Venire facias* to be had of any of the Inns of Court, *Bulstr.* 2 Part, 120. especially of the *Hall*, because it cannot be of a *House*, much less of a *Hall*. Not from House or Hall.

In Ejectment upon a Demise made at *Denham*, of Lands in *Parochia de Denham prædict'*. The *Visne* may be of *Denham*, or of the Parish of *Denham*, because *Denham* and *Parochia de Denham prædict'*. are all one by Intendment of Law, *Bulstr.* 2 Part, 209. *Moor* 709. *Hob.* 6. But when it appears by the Record, or is intended that the Parish is more spacious than the Town, as the Case in *Moor* 837. where in Ejectment the Lease was alledged to be made at *Bredon* of Tithes in *W.* and *W.* Hamlets within the Parish of *Bredon*, there the *Venire facias* must not be of *Bredon*, but of the Parish, because it appears, that the Parish extends further than the Town, *Hob.* 326. Parish.

Where an Action of Debt for Rent is brought upon the Privy of the Contract, by the Lessor, as against the Lessee, or his Executors, for Arrearages due in the Life-time of the Testator, the *Visne* may be laid in any Place; but where the Action is brought upon the Privy in Estate, as against the Assignee of the Lessee, or his Executors, for Rent due For Rent where the Land lies, and where not.

after the Testator's Death, the *Visne* must be where the Lands lie. *Latch* mis-printed, 197, 262, 271. v. li. 3 24.

And so it was adjudged in the Case of *Hall* and *Arnold*, 1656. B. R. And it was farther adjudged there, the Case being of a Lease made at *London*, of Lands in *Monmouthshire*, rendring Rent payable at the *Old Exchange*, for which an Action is brought by the Heir. If there had been no Place of Payment, the Heir must have brought his Action where his Lands lie, but the Place of Payment being in another County, he has his Election, as on a Lease for Years of Lands in two Counties.

Debt for Rent
of Land in
another
County.

Walker's Case, in Debt upon a Lease of Land in another County, *Nil debet* shall be tried where the Action is brought, *Bro. tit. Visne*, 119. *Vide Page 93.*

Manor.

In *Replevin* brought by *Strede* against *Hartly*, for taking a Distress at *Baildon*, the Defendant made Conusance as Bailiff, because that *locus in quo*, &c. was holden of *W. H.* as of his Manor of *Baildon*, and upon Issue, *hors de son fee*, the *Venire facias* was *de vicineto de Baildon*; and upon Motion that the *Venire facias* ought to have been, as well from the Manor as the Town, the Court adjudged it to be well enough, for that the Court shall not intend the Manor was larger than the Town, because it doth not appear so to be, though possibly it might, as like the Case of Town and Parish, *Hob. 305, 306.*

Visne next ad-
joining, in
what Cases.
Cinque Ports.

If the Sheriff return that there are no Freeholders of that *Visne*, or if the *Visne* be where the King's Writ runs not, as in the *Cinque Ports*, &c. or in a Place where the Men are privileged from serving on Juries out of that Place,

Place, as the Isle of Ely, &c. the Plaintiff may pray a *Venire facias* of the *Visne* next adjoining: And if the *Visne* be in *Wales*, (*ou Brief Wales. le Roy ne curt*) the *Venire facias* shall be directed to the Sheriff of the next *English* County, to cause the Jury to come *de propinquiori Visne* of his County, to the *Visne* in *Wales* adjoining; for the Court shall not be ousted of the Plea, *Fitz. Abridg. tit Visne, 8. Jurisdic. 24.*

In an Action against a Hundred, the *Venire facias* may come from the next Hundred generally.

In Trespass, if the Defendant plead Not guilty to part, and to the Residue a Plea, which causes the Trial of that to be by a Jury *de Prochein* Hundred. The *Venire* shall be awarded *al Prochein* Hundred for both Issues, because there ought not to be two *Venire facias*'s in one Action. *Vide Roll. tit. Trial, 596.*

In an Appeal of Murder committed in the *Cinque Ports*, although the King be concerned, yet because this is betwixt common Persons, the *Venire facias* shall be to the next adjoining Vill. *Ibid.*

If the Issue be joined of Matter in *Ireland*, *Ireland.* this shall be tried by a Jury of the next County in *England*. *Ibid.*

If the Issue be to be tried by the *Venue* of a Manor, and the Plaintiff suggests that he is Lord of the Hundred in which the Manor is, and that all within the Hundred are within his Distress, if the Defendant acknowledge this, the *Venue* shall not be *de Corpore Comitatus*, but of the next Hundred, for if it should be *de Corpore Comitatus*, this should be tried by the Tenants of the Manor, *Roll. ib. 667.*

If the *Visne* is in some Part mis-awarded, or sued out of more Places or fewer than it ought *Visne mis-awarded in Part.*

to be, fo as some *Place* be right named, this is aided by the Statute of *Jeofails*, which hath ended the Differences in many Cafes reported in our Books, concerning this Point; wherefore I purpofely omit them.

Infancy,
where the
Land lies.

Error, for that the Judgment was given by Default againft the Defendant, being an Infant, upon Ifsue, that he was of full Age: Adjudged, That the Trial fhould be in *Norfolk* where the Land was, and not in *Middlefex*, where the Action was brought, *Cro.* 3 Part, 818.

May be out
of a wrong
Place by Con-
fent.

If the *Vifne* cometh from a wrong Place, yet if it be *per affenfum partium*, and fo entred of Record, it fhall ftand; for *Omnis Confenfus tollit errorem*, 1 *Inf.* 125.

Where the Ifsue is local the *Vifne* cannot be changed by Confent, *Siderfin* 339.

Holmes verfus Saunders, *Hill.* 22, 23 *Car.* 2. *B. R.* Error to reverse a Judgment given in the *King's Bench* in *Ireland*, in Debt for Rent brought by the Affignees of a Reversion; the Plaintiff declared of a Lease of Land in fuch a Parifh in the Suburbs of *Dublin*; on *Nil debet* pleaded, the *Venire facias* was from the faid Parifh, in *Civitate Dublin*, and Judgment there *pur* Plaintiff; it was affigned for Error, becaufe the Land lies in the Suburbs of the City, and the *Venire facias* was from a Parifh in the City.

Per Cur. It is all one, for the Suburbs are always within the Franchife of the City, as *Fleet-ftreet* is within the Suburbs of *London*, but the *Strand* not, though fo reputed.

Note, It was adjudged Error in an inferior Court, that the *Venire facias* was awarded *fecundum confuetudinem Curiae*, which ought to be
per

per Curiam. Reader versus Moore. Mich. 1650. B. R.

By the Statute of 16 & 17 Car. 2. After Verdict, Judgment shall not be stayed or reversed, for that there is no right *Venue*, so as the Cause were tried by a Jury of the proper County or Place where the Action is laid. This Act doth not extend to Appeals, Indictments of Felony, &c. nor to Actions upon penal Statutes, other than concerning Customs and Subsidies, &c.

Earl of *Shaftsbury* versus *Graham, & al.* *Venue* allowed where a Peer was Party. B. R. Resolv'd, That the Court had Power to alter the *Venue*, in Case of a Peer; especially if there be no likelihood of an indifferent Trial in the Place where the Action is laid, 1 *Vent.* 364.

Every *Venire* out of the Courts of Record at *Westminster*, shall be awarded of the Body of the County, where the Issue is triable: Provided that this Clause shall not extend to Appeals of Felony or Murder, or to any Indictment or Presentment, of Treason, Felony, or Murder; or to any Process on any of them; or to any Writ, Bill, or Information on any penal Statute, 4 & 5 A. cap. 16. *Venire* to be awarded, *de Corpore Com.*

C H A P. IX.

Of Challenges to the Array, &c.

Challenges.

YOU have already seen of what *Visne* the Jury ought to be: The next Thing to be considered is concerning Challenges.

Challenge is a Word common, as well to the *English* as to the *French*, and sometimes signifieth to claim, and the *Latin* word is *Vindicare*; sometimes in respect of Revenge, to challenge into the Field, and then it is called in *Latin*, *vindicare* or *provocare*; sometimes in respect of Partiality or Insufficiency, to challenge in Court, Persons returned on a Jury. And seeing there is no proper *Latin* Word to signify this particular Kind of Challenge, they have framed a Word anciently written *Chalumniare*, and *Columpiare*, and *Calumpniare*, and now written *Calumniare*, and hath no Affinity with the Verb *Calumnier*, or *Calumnia*, which is derived of that, for that is of a quite other Sense, signifying a false Accuser; and in that

Calumniator.

Sense *Bracton* useth *Calumniator*, to be a false Accuser: But it is derived of the old Word *Caloir* or *Chaloir*, which in one Signification is to care for or foresee. And for that to challenge Jurors, is the Mean to care for or foresee, that an indifferent Trial be had, it is called *Calumniare*, to challenge, that is, to except against them that are returned to be Jurors, and this is its proper Signification: But sometimes a Summons, *Summonitio*, is said to be *Calumniata*, and a Count to be challenged, but

but this is improperly. And forasmuch as Mens Lives, Fames, Lands and Goods, are to be tried by Jurors, it is most necessary that they be *Omni exceptione majores*, and therefore I will handle this Matter more largely.

A Challenge to the Jurors is two-fold, either **Challenge is** to the Array, or to the Polls: To the Array **two-fold.** of the principal Panel, and to the Array of the *Tales*. And herein you shall understand that the Jurors Names are ranked in the Pa- **To the Array.** nel, one under another, which order or ranking the Jury, is called the Array, and the Verb, to array the Jury, and so we say in common Speech, *Battail Array*, for the Order **Array.** of the Battail. And this Array we call *Arraiementum*, to make the Array, *Arraire*, derived of the *French* word *arroier*; so as to challenge the Array of the Panel, is at once to challenge or except against all the Persons so arrayed or impanelled, in respect of the Partiality or Default of the Sheriff, Coroner, or other Officer that made the Return.

And it is to be known, that there is a prin **Principal** cipal Cause of Challenge to the Array, and a **Challenges.** Challenge to the Favour; principal in respect of Partiality; as first, If the Sheriff or other Officers be of Kindred or Affinity to the Plaintiff or Defendant, if the Affinity continue. Secondly, If any one or more of the Jury be returned at the Denomination of the Party, Plaintiff or Defendant, the whole Array shall be quashed. So it is if the Sheriff return any one, that he be more favourable to the one than to the other. all the Array shall be quashed. Thirdly, If the Plaintiff or Defendant have an Action of Battery against the Sheriff, or the Sheriff against either Party, this is a good Cause of Challenge. So if the

the Plaintiff or Defendant have an Action of Debt against the Sheriff; (but otherwise it is, if the Sheriff have an Action of Debt against either Party) or if the Sheriff have Parcel of the Land depending upon the same Title, or if the Sheriff or his Bailiff which returned the Jury, be under the Distress of either Party; or if the Sheriff or his Bailiff be either of Counsel, Attorney, Officer in Fee, or of Robes, or Servant of either Party, Gossip, or Arbitrator in the same Matter, and treated thereof. And where a Subject may challenge the Array for Unindifferency, there the King being a Party, may also challenge for the same Cause, as for Kindred, or that he hath part of the Land, or the like; and where the Array shall be challenged against the King, you shall read in our Books.

In Ejectment, the Plaintiff suggesteth that his Lessor, the Sheriff and Coroners, were Tenants to a Dean and Chapter, whose Interest was concerned, and prayed the *Venire facias* to *Elisors*, and had it, being confessed by the Defendant, and the Court took it a principal Challenge, *vide* Hut. 24. Moor 470. Roll. Rep. 328. Duncomb and Ingleby. Trin. 15 Car. 2. B. R.

A Prayer to *Elisors* in Trials at Bar may be at the Suit of the Defendant or Plaintiff, but in *Nisi prius* at the Prayer of the Plaintiff only; and *per Cur'*. It is a principal Challenge that the Plaintiff's Lessor is Sheriff or Kindred, and if the Plaintiff doth not pray, &c. the Defendant may challenge the Array at the Affizes, Lord Brooke's Case, Trin. 1657. B. R.

'Tis a good Challenge to the Array, that the Array is made and returned by two Coroners

roners only, when there are four in the County, and that the Writ is returned by one of the Sheriffs of *London* only. So if a Bailiff return them that are out of his Franchise, or if an Array be to be of Persons out of a Franchise and Guildable, and the Bailiff return them, for the Sheriff ought to make it; and that some of the Panel were returned by the Bailiff of a Franchise, where the whole Panel is returned as Array by the Sheriff, this is a good Challenge to the Array, for otherwise the Parties would lose their Challenge to the Array made by the Bailiff, *Roll. tit. Trial, 636.*

If the Defendant sue the Writ of *Habeas Corpus* by *Proviso*, at the Return, the Plaintiff son. *By what Person.* may challenge the Array for Kindred between the Defendant and the Sheriff, *D. 15 El. 319. 13.*

D. 15 El. 319. The Array was quashed although the Sheriff was the *Neuse* in Descent, and the Tenant in the seventh Descent from the Ancestor of whom both descended, Cousin to the Party's Wife, although herself no Party. *What Consanguinity is sufficient.* So if the Wife be dead, if Issue be alive, these are good Challenges to the Array.

Alliance to one Party is a good Challenge. *For Affinity.*

If the Sheriff be allied at the making of the Panel, and be dead at the Challenge, yet this is a good Challenge. *At what Time.* 'Tis no Challenge that the Sheriff became of Kin after making the Panel.

'Tis no Challenge to the Array if all the Jurors be of Affinity.

It may be after a *Tales* prayed, for no Challenge can be until the Jury is full. If the Suggestion of Cousinage to have the *Venire facias* to the Coroners, be denied, and the *Venire*
nire

nire facias is awarded to the Sheriff, the same Challenge shall not be allowed to the Array, but any other Cause may be alledged, than what was before denied.

For Favour.

Favourably made by the Sheriff or his Bailiff, or the Bailiff of a Franchise, is a good Challenge. That the Sheriff is within the Distress of a Party, or Servant to the Plaintiff, of the Robes of the Plaintiff, was Arbitrator for a Party, is Procurator and Maintainer of a Party: That the Sheriff purchased part of the Land in question: That the Panel was made by the Bailiff of the Franchise of the other Party: These are good Challenges to the Array.

'Tis no principal Challenge that one Party is Tenant or Servant to the Sheriff, but it is a good Challenge for Favour.

Denomination.

It is a good Challenge to the Array, That the Sheriff made the Array, or put a Juror into the Panel at the Denomination of any of the Parties in Favour to them, or of their Servants, or of one interested, or of a Maintainer, or of the Counsel, or of a Procurator.

Not if Strangers by the Sheriff's Leave make the Panel, or it be made at the Request of both Parties.

For Malice.

'Tis a good Challenge to the Array, that one of the Parties has brought an Action of Debt against the Officer that returns that Panel, or that there is a Difference betwixt the Officer and the Party, that the Officer killed his Servant.

But not that the Officer has Debt against the Party, for he may demand his Debt without Malice.

The

The Challenge ought to be *quod tempore Panneli prædict' Arraiati*, the Sheriff was Cousin to the Wife of the Defendant, &c. not afterwards, nor before, unless you aver that she was alive, or had Issue at the making the Panel. How, and in what Manner the Challenge is to be made.

If the Challenge be taken for Cousinage, it ought to be shewn *coment* Cousin, but in such a Challenge to be a Juror, 'tis not necessary to shew *coment* Cousin.

The Matter and Conveyance of the Cousinage alledged in a Challenge, is not traversable. You may traverse the Cousinage *prout* without *modo & forma*. If the Challenge be, that the Sheriff was Cousin to the Plaintiff, or within his Distress; 'tis no Counterplea to say he is likewise of Kin to the Defendant, or within his Distress also. What Counterplea of a Challenge is good, and how to be pleaded.

Where the King is Party to the Issue, no Challenge shall be to the Array for Favour, Where the King is Party.
38 Aff. 19.

Otherwise if the Sheriff be Vadelect of the King's Crown, or such menial Servant.

If it be presented that J. S. hath made a Nuisance to *London* and *le gents*, 'tis no Challenge to the Array, to say the Sheriff of *Middlesex* is deputed and removeable by the Commonalty of *London*, because this is the Suit of the King.

The King may make his Challenge, that the Sheriff is within the Party's Distress, although every Subject owes greater Favour and Obedience to the King, by reason of his Allegiance, than to any Lord by reason of Tenure.

In a Writ of Right, or any other Writ, a Baron of the Realm may excuse himself. What Persons may be impanelled.
In

In a Writ of Right, the Inquest ought to be all Knights. A Banneret may be impanelled in this Writ; so may a Serjeant, if there be not Chivalers covenable.

In an Attaint upon a Recovery by false Verdict in an Affize, some Knights ought to be returned; and if there be not any in the Hundred where the Land lies, they shall be returned out of the County.

By Default of the Sheriff, as when the Array of a Panel is returned by a Bailiff of a Franchise, and the Sheriff return it as of himself, this shall be quashed, because the Party shall lose his Challenges. But if a Sheriff return a Jury within a Liberty, this is good, and the Lord of the Franchise is driven to his Remedy against him.

Where there must be a Knight returned of the Jury.

Note, This Challenge may be taken by the Peer, but not by the other Party, who is not a Peer, for it is only the

Privilege of a Peer, *Modern Reports, 226.*

Stat. 117. Note the Law is now altered by Stat. 24. George. 2. Cap. 19.

If a Peer of the Realm, or Lord of Parliament be Demandant or Plaintiff, Tenant or Defendant, there must a Knight be returned of his Jury, be he Lord Spiritual or Temporal, or else the Array may be quashed: But if he be returned, although he appear not, yet the Jury may be taken of the Residue. And if others be joined with the Lord of Parliament, yet if there be no Knight returned, the Array shall be quashed against all. So in an Attaint, there ought to be a Knight returned to the Jury.

If two Peers sue as Gentlemen, and admit themselves so in Pleading; 'tis no Challenge to say, no Knight is returned; for the Sheriff is in no Fault.

Where the King is Party.

And when the King is Party, as in Traverses of an Office, he that traverseth may chal.

challenge the Array, as hereafter in this Section shall appear, and so it is in case of Life: And likewise the King may challenge the Array, and this shall be tried by Tryors, according to the usual Course. The Array challenged on both Sides shall be quashed.

And if two Estrangers make a Panel, and not in a favourable Manner for the one Party or the other, and the Sheriff returns the same, the Array was challenged for this Cause, and adjudged good.

If the Bailiff of a Liberty return any out of his Franchise, the Array shall be quashed, as an Array returned by one that hath no Franchise shall be quashed.

Challenge to the Array for Favour: He that taketh this, must shew in certain the Name of him that made it, and in whose Time, and all in Certainty: This kind of Challenge being no principal Challenge, must be left to the Discretion and Conscience of the Tryors; as if the Plaintiff or Defendant be Tenant to the Sheriff, this is no principal Challenge, for the Lord is in no Danger of his Tenant; but *è converso* it is a principal Challenge; but in the other he may challenge for Favour, and leave it to Trial. So Affinity between the Son of the Sheriff, and the Daughter of the Party, or *è converso*, or the like, is no principal Challenge, but to the Favour; but if the Sheriff marry the Daughter of either Party, or *è converso*, this (as hath been said) is a principal Challenge, or the like. But where the King is Party, one shall not challenge the Array for Favour, &c. because in respect of his Allegiance, he ought to favour the King more. But if the Sheriff be a Vadelect of the Crown, or other menial

Challenge to
the Favour.

For the King.

Servant of the King, there the Challenge is good, and likewise the King may challenge the Array for Favour.

To the Array. *Note,* Upon that which hath been said it appeareth, that the Challenge to the Array, is in respect of the Cause of Unindifferency, or Default of the Sheriff or other Officer that made the Return, and not in respect of the Persons returned, where there is no Unindifference or Default in the Sheriff, &c. for if the Challenge to the Array be found against the Party that takes it, yet he shall have his particular Challenge to the Polls.

To the Polls. In some Cases a Challenge may be had to the Polls, and in some Cases not at all. Challenge to the Polls is a Challenge to the particular Persons, and these be of four kinds, that is to say, Peremptory, Principal, which induce Favour, and for Default of Hundredors.

Peremptory Challenge.

Peremptory, this is so called, because he may challenge peremptorily upon his own Dislike, without shewing of any Cause, and this only is in case of Treason or Felony, *in favorem vitæ*; and by the Common Law, the Prisoner upon an Indictment or Appeal, might challenge thirty-five, which was under the Number of three Juries; but now by the Statute of 22 H. 8. the Number is reduced to twenty in Petit Treason, Murder and Felony; and in Case of High Treason, and Misprision of High Treason, it was taken away by the Statute of 32 H. 8. But now by the Statute of 1 & 2 Phil. & Mar. the Common Law is revived for any Treason, the Prisoner shall have his Challenge to the Number of thirty-five, and so it hath been resolved by the Justices, upon Conference between them in the

the Case of Sir *Walter Raleigh* and *George Brooks* : But all this is to be understood when any Subject that is not a Peer of the Realm, is arraigned for Treason or Felony. But if he be a Lord of Parliament, and a Peer of the Realm, and is to be tried by his Peers, he shall not challenge any of his Peers at all ; for they are not sworn as other Jurors be, but find the Party Guilty or Not guilty, upon their Faith or Allegiance to the King, and they are Judges of the Fact, and every of them doth separately give his Judgment, beginning at the lowest. But a Subject under the Degree of Nobility, may, in case of Treason or Felony, challenge for just Cause, as many as he can, as shall be said hereafter. In an Appeal of Death against divers, they plead Not guilty, and one joint *Venire facias* is awarded ; if one challenge peremptorily, he shall be drawn against all ; otherwise it is of several *Venire fac.*

No Challenge
of Peers.

Note, That at the Common Law, before the Statute of 33 E. 1. the King might have challenged peremptorily without shewing Cause, but only that they were not good for the King, and without being limited to any Number ; but this was mischievous to the Subject, tending to infinite Delays and Danger. And therefore it is enacted, *Quod de cætero licet pro Domino Rege dicatur quod juratores, &c. non sunt boni pro Rege; non propter hoc remaneant Inquisitiones, &c. sed assignent causam calumniæ suæ, &c.* whereby the King is now restrained.

The King's
Challenge re-
strained.

Principal, so called, because, if it be found true, it standeth sufficient of it self without leaving any Thing to the Conscience or Discretion of the Triers. Of a principal Cause of Challenge to the Array, we have somewhat already ; now it followeth with

Principal
Challenge to
the Polls.

like Brevity, to speak of principal Challenges to the Polls, (that is) severally to the Persons returned.

A principal Challenge is nothing else but such Matter which proves evident Favour or Enmity in the Juror; and therefore it belongeth to the Justices to draw the Juror, and not to leave the Decision to Triors, 21 E. 4. 11.

To the Polls. Principal Challenges to the Polls may be reduced to four Heads; First, *Propter honoris respectum*, for respect of Honour. Secondly, *Propter Defectum*, for Want or Default. Thirdly, *Propter Affectum*, for Affection or Partiality. Fourthly, *Propter Delictum*, for Crime or Delict.

Principal Challenges to the Polls. First, *Propter Honoris respectum*: As any Peer of the Realm, or Lord of Parliament, as a Baron, Viscount, Earl, Marquess, and Duke; for these in Respect of Honour and Nobility, are not to be sworn on Juries; and if neither Party will challenge him, he may challenge himself; for by *Magna Charta* it is provided, *Quod nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, aut per legem terræ.* Now the Common Law hath divided all the Subjects into Lords of Parliament, and into the Commons of the Realm.

A Peer may challenge himself. The Peers of the Realm are divided into Barons, Viscounts, Earls, Marquesses and Dukes; the Commons are divided into Knights, Esquires, Gentlemen, Citizens, Yeomen and Burgeses: And in Judgment of Law any of the said Degrees of Nobility are Peers to another: As if an Earl, Marquess or Duke be to be tried for Treason or Felony; a Baron, or any other Degree of Nobility,

Peers and Commons.

bility, is his Peer. In like manner a Knight, Esquire, &c. shall be tried *per Pares*, and that is by any of the Commons, as Gentlemen, Citizens, Yeomen or Burgessees; so as when any of the Commons is to have a Trial, either at the King's Suit, or between Party and Party, a Peer of the Realm shall not be impanelled in any Case.

Secondly, *Propter Defectum*.

1. *Patriæ*, As Aliens born
2. *Libertatis*, As Villains or Bondmen, and so a Champion must be a Freeman.
3. *Annui census, i. e. liberi tenementi*.

Challenge,
Propter defect.

First, What yearly Freehold a Juror ought to have, that passeth upon Trial of the Life of a Man, or in a Plea real, or in a Plea personal, where the Debt or Damage in the Declaration amounteth to forty Marks, *See before cap. 7.* *Quorum quilibet habeat 4l.* *Littleton, Sect. 464.* Secondly, This Freehold must be in his own Right, in Fee-simple, Fee-tail, for Term of his own Life, or for another Man's Life, although it be upon Condition, or in the Right of his Wife, out of ancient Demesne; for Freehold within ancient Demesne will not serve: But if the Debt or Damage amounteth not to forty Marks, any Freehold sufficeth. Thirdly, He must have Freehold in that County where the Cause of the Action ariseth, and though he hath in another, it sufficeth not. Fourthly, If after his Return he selleth away his Land, or if *Cestuique vie*, or his Wife dieth, or an Entry be made for the Condition broken, so as his Freehold be determined, he may be challenged for Insufficiency of Freehold.

In Cases of Treason and Felony, at Common Law, Want of Freehold was no Cause of Challenge; *probos & legales homines*, was sufficient. The Statute of 2 H. 5. is gone as to that by the Statute of 1 and 2 of Queen Mary. See the Lord Russell's Trial. July 13. 1683.

It seems before the Statute 2 H. 5. in Actions where the Freehold was concerned, the Jurors ought to have some Freehold, 3 H. 4. 4. By that Statute in all Pleas real and personal, where the Debt or Damage, or both together amount to forty Marks, the Juror must have forty Shillings Freehold. In an Attaint they must be able to expend twenty Pounds *per Annum*, Roll. tit. Trials, f. 648.

In an Accompt, upon the Receipt of one hundred Shillings, if he count to his Damage two hundred Shillings, if the Juror hath but twenty Shillings, or under forty Shillings, 'tis sufficient, because he shall not recover Damages, and so this is not within the Statute 10 H. 6. 18. for the Sufficiency of Jurors. See Roll. tit. Trial, 648.

A Man seised of a Manor of Dale, enfeoffs a Stranger upon Condition to pay yearly to J. S. and his Heirs, forty Shillings Rent. J. S. dies seised of this Rent, and then his Heir takes it, yet the Heir hath not sufficient Freehold.

Land to the Value of forty Shillings is given to the Husband and Wife, and the Heirs of their two Bodies begotten, who had Issue a Son; the Husband gives the Land by Fine to an Estranger and his Heirs, and dies, the Wife enters and dies seised; the Son hath not sufficient Freehold to be a Juror.

A Man seised of Land to the Value of forty Shillings within the County of *Middlesex*, and of Land to the Value of Twelve, within the County of *Sussex*, and grants a Rent-Charge of forty Shillings. issuing out of all the said Land to a Stranger in Fee; the Grantee hath sufficient Freehold to be a Juror in both Counties. See many speculative Cases upon this Subject, in *Williams* his Reading upon the Statute 35 H. 8. cap. 6.

4. *Hundredorum*: First, By the Common Law in a Plea real, mix'd and personal, there ought to be four of the Hundred (where the Cause of Action ariseth) returned for their better Notice of the Cause; for *Vicini vicinorum facta præsumentur scire*. And now, since *Littleton* wrote, in a Plea personal, if two Hundredors appear, it sufficeth; and in an Attaint, though the Jury is double, yet the Hundredors are not double. Secondly, If he hath either Freehold in the Hundred, though it be to the Value but of half an Acre, or if he dwell there, though he hath no Freehold in it, it sufficeth. Thirdly, If the Cause of the Action riseth in divers Hundreds, yet the Number shall suffice as if it had come out of one, and not several Hundredors out of each Hundred. Fourthly, If there be divers Hundreds within one Leet or Rape, if he hath any Freehold, or dwell in any of those Hundreds, though not in the proper Hundred, it sufficeth. Fifthly, If the Jury come *de Corpore Comitatus*, or *de proximo Hundredo*, where one Party is Lord of the Hundred, or the like, there need no Hundredors be returned at all. Sixthly, If a Hundredor, after he be returned, sell away his Land within that Hundred, yet shall he not be challenged

Challenges
propter defectum
hundredorum.

Hundredors.

No Hundredors.

for the Hundred, for that his Notice remains; otherwise, as hath been said, for his Insufficiency of Freehold, for his Fear to offend, and to have Lands wasted, &c. which is one of the Reasons of Law, is taken away. Seventhly, He that challengeth for the Hundred, must shew in what Hundred it is, and not drive the other Party to shew it. Eighthly, His Challenge for the Hundred is not *simpliciter*, but *secundum quid*; for though it be found that he hath nothing in the Hundred, yet shall he not be drawn, but remain *præter H.* that is, besides for the Hundred; and albeit he dwelleth, or have Land in the Hundred, yet must he have sufficient Freehold.

Note, This challenge for want of Hundredors, must be given in writing presently, and the other Party is to demur thereto, if opposed.

If a Challenge be, that there is not any Hundredor returned, it may be averred to the Court, that there is not any sufficient within the Hundred, which is not within the Fee of the Plaintiff; although this be not returned by the Sheriff, and this be found true by Triors, the Array shall be affirmed, 45 *Aff.* 1.

If the King be made Party by Aid Prayer, and sufficient Hundredors do not appear, nor are returned, yet the Panel shall not be quashed, but a *Tales* of Hundreds shall be returned. But betwixt common Persons in such Cases, the Panel shall be quashed, and this shall not only be a Challenge to the Heads. 25 *E.* 3. 43.

If the Sheriff return *quod non sunt pluries del Hundred*, he shall take of the Hundred adjoining, which shall be sufficient, 19 *H.* 6. 48.

If

If the Juror hath sufficient Land within the Hundred, although he doth not dwell within the Hundred, yet he is a sufficient Hundredor, 9 H. 6. 66. Nay though he dwell in another County.

If he be not Hundredor at the Return of the *Venire*, but at the Return of the *Distingas*, yet this doth not take away the Challenge.

After four are sworn, or after a Challenge to the Polls, there can be no Challenge for the Hundred, *Roll. tit. Trial, 636.*

At what Time the Challenge must be.

Who shall be sufficient Hundredor, see *Williams* his Reading aforesaid.

If he dwell or have Assets within the Leet, Rape, Franchise or Vill, where the *Venue* is, he is a sufficient Hundredor.

If he hath Assets in Rent, Common of any Sort, Market, Fair, Piscary, Toll, Passage, Leet, Office of Bailiwick, &c. he is a sufficient Hundredor; otherwise of an Advowson, &c.

3. *Propter affectum*; and this is of two Sorts, Challenge either working a principal Challenge, or to the Favour. And again a principal Challenge is of two Sorts, either by Judgment of Law, without any Act of his, or by Judgment of Law upon his own Act.

propter affectum.

And it is said, That a principal Challenge is, when there is expresse Favour, or expresse Malice. First, without any Act of his, as if the Juror be of Blood or Kindred to either Party, *Consanguineus*, which is compounded *ex con & sanguine, quasi eodem sanguine natus*, as it were issued from the same Blood; and this is a principal Challenge; for that the Law presumeth that one Kinsman doth favour another before a Stranger; and how far remote soever he is of Kindred, yet the Challenge is good,

Principal Challenge.

Kindred, Sid. 2 Par.

155.

good. And if the Plaintiff challenge a Juror for Kindred to the Defendant, it is no Counter-plea, to say that he is of Kindred also to the Plaintiff, though he be in a nearer Degree. For the Words of the *Venire facias* forbid the Juror to be of Kindred to either Party.

Bodies Politick.

If a Body Politick or Incorporate, sole or aggregate of many, bring any Action that concerns their Body Politick or Incorporate, if the Juror be of Kindred to any that is of that Body, although the Body Politick or Incorporate can have no Kindred, yet, for that those Bodies consist of natural Persons, it is a principal Challenge. A Bastard cannot be of Kindred to any, and therefore it can be no principal Challenge. And here it is to be known, that *Affinitas*, Affinity hath in Law two Senses. In its proper Sense it is taken for that Nearness that is gotten by Marriage, *Cum duæ cognationes inter se divisæ per nuptias copulantur, & altera ad alterius fines accedit, & inde dicitur Affinis*. In a larger Sense *Affinitas* is taken also for Consanguinity and Kindred, as in the Writ of *Venire facias*, and elsewhere. Affinity or Alliance by Marriage is a principal Challenge, and equivalent for Consanguinity, when it is between either of the Parties; as if the Plaintiff or Defendant marry the Daughter or Cousin of the Juror, or the Juror marry the Daughter or Cousin of the Plaintiff or Defendant, and the same continues, or Issue be had. But if the Son of the Juror hath married the Daughter of the Plaintiff, this is no principal Challenge, but to the Favour, because it is not between the Parties. Much more may be said hereof, *sed summa sequor fastigia rerum*.

Affinity.

As

As if he hath formerly tried the Cause, al- though reversed by Error, or upon the same Title; if the Record be not shewed, this Challenge is not peremptory. *For he that grounds a Challenge upon a Record, &c. ought to have the Record ready,* 33 H. 6. 55. The Record ought to be exemplified, 21 E. 4. 74.

Peremptory
Challenge
upon Record.

'Tis a good Challenge to say, the Juror was attainted in an Attainder or Writ of Conspiracy; but Attainder in a Writ of Forgery of false Deeds upon the Statute 1 H. 5. 2. (but 'tis upon 5 Eliz. 14.) is not, because this Attainder is given of late Time by the Statute 33 H. 6. 55.

In a Writ of Conspiracy, 'tis a principal Challenge, That the Juror was one of the Indictors, although the Trial is now of the Conspiracy, and not upon the first Point, viz. the Felony.

In Trespass, if one justifie as Master, and the other as Servant; 'tis not a principal Challenge to say the Juror passed in the first Issue for the Master, but he ought to conclude, & *issint* favourable, 18 E. 4. 12.

If two plead Not guilty, and first one Issue is tried and then the other is tried; 'tis no Challenge to say the Juror tried the other Issue, and gave Damages, of which Damages he shall be charged if he be attainted in an Attaint; for perhaps the Defendant will be found not guilty.

That the Juror is within the Distress of any of the Parties, is a good Cause of Challenge. And so it is, if he be within the Distress of any Person concerned, although no Party to the Action: As within the Distress of *A.* the Master of the Defendant, who justifies as Servant to *A.* by Reason of his Freehold; and

Dims distress

and the Issue is *sur le franktenement*. So for him in Reversion received, within the Distress of the Tenant for Life. And so in an Action by the Tenant for Life, within the Distress of him in Reversion: These are good Challenges.

So in an Action by Dean and Chapter, within the Distress of the Chapter, or one of the Chapter, are good Challenges.

Principal for
Consanguini-
ty.

Consanguinity of the half Blood is a principal Challenge: If the Juror be at the ninth Degree, if it can be shewed, it is good.

In an Action by the Dean and Chapter, or Mayor and Commonalty, Brother to one of the Commonalty, or to one of the Commons, is a good Challenge: So to any Person concerned in Interest, although no Party to the Action. As Cousin to the Patron, or the Parson, &c. so in Attaint to one of the *Petit Jury*.

But in an Ejectment, and Not guilty pleaded, 'tis no Challenge to the Array, that the Sheriff is Cousin to the Lessor of the Plaintiff; for it doth not appear that the Title of him in Reversion shall be in Question, and he in Reversion is no Party to the Action: See it so adjudged upon Demurrer, *Roll. tit. Trial, 653*. But now in our feigned Ejectments it is otherwise, because the Title of the Lessor is only in Question.

Principal for
Affinity.

'Tis a good Challenge that the Juror is Gossip to the Plaintiff, & *sic è converso*; and so although the Son be dead; ~~for~~ the spiritual Affinity remains, and so is *Curat* of the Juror. That the Juror hath married the Sister of the Party; that the Daughter of the Uncle of the Juror hath married the Uncle of the Party; Cousin to the Wife of the Party; These are
good

good Challenges, although the Wife, &c. is dead, if her Issue be alive; otherwise if she be dead without Issue, for then the Cause of the Favour is determined.

But 'tis no Challenge to say, the Juror is Brother to one who married the Sister of the Party, nor that the Son of the Party married the Sister of the Juror; because these are not Parties to the Action.

In Attaint 'tis a good Challenge to the Juror, that he hath married the Sister of the Wife of one of the *Petit Jury*, for the Alliance.

If a Juror declare the Right of one Party, Principal for Favour. or give his Verdict before hand, or take Money, this is a principal Challenge; but if he promise a Party, this is not a principal Challenge, but for Favour.

If the Action depending betwixt the Party Principal for Malice. and Juror, be such as implieth Malice, this is a good Challenge; but not if it imply no Malice.

That the Party hath an Appeal depending against the Juror, or the Juror against him, or Action of Battery. That they are in Debate and Wrangling, &c. are good Challenges. Not Actions of Debt or Trespas *Quare Clausum fregit*, &c. Nor that the Brother, &c. of the Party, hath Actions against the Juror.

That the Juror was born out of the King's Peremptory. Ligeance; for although he came into *England* an Infant, and is sworn to the King, yet he continues an Alien; and that he is out- Alien. lawed, for then he is not *legalis homo*, are good Challenges.

If the Juror says, That he will pass for one For Favour. Party, because he knows the Verity of the Matter, this is no Challenge; But if he says 'tis for Favour, 'tis a good Challenge, if the Tryors

Tryors find he spoke for Favour, and not for Truth.

King.

In an Action betwixt the King and a Party, the Subject cannot take any Challenge for Favour, as in an Indictment of Barretry, &c. the Defendant cannot challenge a Juror for Favour to the King.

How Challenges shall be taken of a Record.

If the Record be in the same Court, it need not be shewn, but if it be in another Court, it ought to be shewed ; or else 'tis no principal Challenge.

At what Time they may be taken.

After the Array is affirmed, there shall not be such Challenge to a Juror which would have been a sufficient Challenge to the Array. As 'tis not a good Challenge that the Juror was impanelled at the Denomination of a Party, for this had been a good Challenge to the Array.

If a Man challenge a Juror for Non-sufficiency of Freehold, and this is adjudged against him, yet he may challenge for Favour, and this shall be tried, 10 H. 6. 18.

If the Jury upon finding of the Principal, do not tax the Damages, for which a *Venire facias* issues to the same Jurors, to tax the Damages, the Parties cannot take any Challenge for a Cause before the first Trial. But for a Cause arising after they may. And so against *les primer Jurors*.

King.

The King cannot challenge a Juror after he is sworn, unless it be for a Cause arising after he is sworn.

In what Cases he which challenges ought to shew the Cause presently.

If the Defendant challenge the Array which is found against him, or he release the Challenge, and the Array is affirmed, and afterwards he challenge a Juror ; he ought to shew the Cause presently.

But if there be two Defendants, and one challenge the Array, and afterwards both challenge a Juror; the other shall not shew Cause presently.

If a Juror be challenged, and there be enough of the Panel besides, the Cause of Challenge need not be shewed unless the other Side challenges *touts peravail*.

If any of the Jurors be sworn, and there be not sufficient, for which a *Tales* is granted, and at the Return one of the *primer* Jurors is challenged, the Cause ought to be shewed presently, he being sworn before.

In an Action between the King and a com- King.
mon Person, as in an Indictment of Barretry, Presentment of Nufance, &c. the Defendant, if he challenges any Juror, must shew the Cause presently.

But in an Inquest betwixt the King and a Stranger, the Stranger need not shew the Cause presently; for in this Case the King is as a common Person of the Realm.

Cause ought to be shewed before the *Tales* be perused.

If both Parties challenge, although for se- *Treas.*
veral Causes, as if one be for Favour, and the other Peremptory; yet the Juror shall be drawn without shewing Cause.

It may be in an Inquest before the Sheriff *In what In-*
to inquire of Waste, both to the Array and *quest a Chal-*
Polls. *lenge may be.*

But not in an Inquest of Office, as in a Writ of Inquiry of Damages.

In a Writ of Right a Challenge may be to the Polls *del 4 Chivalers* returned.

Not of Cosinage to the Witnesses coming to try the Deed in an Affize.

If

**Trial and
Triors, and
Challenges.**

If one Party challenge the Array which is affirmed, and afterwards challenge a Juror; he ought to shew Cause presently, and this shall be tried presently; but otherwise of the other, who did not take the Challenge to the Array.

The Challenge of him who first challenged, shall be first tried; although the first be for Favour, and that of the others be *riens diens H.*

If the *Venue* be of two Counties, and both Panels challenged, the *Eslistors* shall be one of one Panel, and the other of the other.

If the Array be challenged, the Court to try the Array may chuse two Tryors, according to their Discretion, 29 *Aff.* 15. 19 *H.* 6. 9.

**What Chal-
lenge they
may try.**

If an Action be depending between the Juror and one of the Parties, and for this he is challenged, and the other says, that this is brought by Covin; the Tryors may try this; for although the Action is of Record, yet the Covin is not.

Evidence.

The Juror may be examined upon a *Voier dire*, to any Challenge that is not to his Dishonour; but the Tryors are not bound by his Oath.

The Tryors after they are sworn may go at large by Assent of the Parties until another Day.

**In what Cases
a Challenge or
Affirmance
by one shall
serve for o-
thers.**

In Trespas against two who plead to Issue, and a *Venire facias* is returned, although one accept the Array, yet the other may challenge it, and if it be found, the Array shall be quashed against all. So in an Appeal against Principal and Accessary, for one shall not disinherit the other.

But in an Appeal by two, if the Defendant challenge a Juror, and one of the Plaintiffs agree to this; the other shall not be received

to say, that this is by Covin, but the Juror shall be drawn in Favour to the Life of Man.

And yet in a *Præcipe quod reddat* by two, and the Tenant challenge the Array, because the Sheriff is Gossip to one of the Demandants, and one Demandant acknowledge the Challenge, the other may say that this is not so, and have it tried, *Roll tit Trial*, 662, &c.

In *Gager de Ley* none shall be challenged for *Ley Gager*. Favour or Insufficiency, &c.

If there be a Challenge for Cofinage, he that takes the Challenge must shew how the Juror is Cousin. But yet if the Cofinage, that is, the Effect and Substance be found, it sufficeth; for the Law preferreth that which is material, before that which is formal.

If the Juror have Part of the Land that dependeth upon the same Title. Depending on the same Title.

If a Juror be within the Hundred, Leet, or any Way within the Seigniorie, immediately or mediately, or any other Distress of either Party, this is a principal Challenge. But if either Party be within the Distress of the Juror, this is no principal Challenge, but to the Favour. Distress.

If a Witness named in the Deed be returned of the Jury, it is a good Cause of Challenge of him. So if one within Age of one and twenty be returned, it is a good Cause of Challenge. Witness. Infant.

Upon his own Act, as if the Juror hath given a Verdict before for the same Cause, albeit it be reversed by Writ of Error, or if after Verdict Judgment were arrested. So if he hath given a former Verdict upon the same Title or Matter, though between other Persons. But it is to be observed, that I may speak once for all, that in this or other like Challenges arising from the Jurors own Act. Former Verdict.

Cases, he that taketh the Challenge must shew the Record, if he will have it take Place as a principal Challenge, otherwise he must conclude to the Favour unless it be a Record of the same Court, and then he must shew the Day and Term.

Indictment. So likewise one may be challenged, that he was Indictor of the Plaintiff or Defendant, either of Treason, Felony, Misprision, Trespas, or the like in the same Cause.

Godfather. If the Juror be Godfather to the Child of the Plaintiff or Defendant, or *è converso*, this is allowed to be a good Challenge in our Books.

Arbitrator. If a Juror hath been an Arbitrator chosen by the Plaintiff or Defendant, in the same Cause, and have been informed of, or treated of the Matter, this is a principal Challenge. Otherwise if he were never informed nor treated thereof; and otherwise if he were indifferently chosen by either of the Parties, though he treated thereof. But a Commissioner chosen by one of the Parties, for Examination of Witnesses in the same Cause, is no principal Cause of Challenge; for he is made by the King under the Great Seal, and not by the Party as the Arbitrator is, but he may upon Cause be challenged for Favour.

**Commis-
sioner.**

Arbitrator in another Matter is no Cause of Challenge.

Counsel.

If he be of Counsel, Servant, or of Robes or Fee, of either Party, it is a principal Challenge.

**Eat or Drink
at the Par-
ties Charge.**

If any, after he be returned, do eat and drink at the Charge of either Party, it is a principal Cause of Challenge; otherwise it is of a Tryor after he be sworn.

Action

Action brought either by the Juror against either of the Parties, or by either of the Parties against him, which may imply Malice or Displeasure, are Causes of principal Challenge, unless they be brought by Covin, either before or after the Return; for if Covin be found, then it is no Cause of Challenge; other Actions which do not imply Malice or Displeasure, are to the Favour as an Action of Debt, &c. *Moor 3.*

In a Cause where the Parson of a Parish is Party, and the Right of the Church cometh in Debate, a Parishioner is a principal Challenge. Otherwise it is in Debt, or any other Action where the Right of the Church cometh not in Question.

If either Party labour the Juror, and give him any Thing to give his Verdict, this is a principal Challenge. But if either Party labour the Juror to appear, and to do his Conscience, this is no Challenge at all, but lawful for him to do it.

That the Juror is a Fellow-Servant with either Party, is no principal Challenge, but to the Favour.

Neither of the Parties can take that Challenge to the Polls, which he might have had to the Array.

Note, If the Defendant may have a principal Cause of Challenge to the Array, if the Sheriff return the Jury, the Plaintiff in that Case may for his own Expedition, alledge the same, and pray Process to the Coroners, which he cannot have, unless the Defendant will confess it; but if the Defendant will not confess it, then the Plaintiff shall have a *Venire facias* to the Sheriff, and the Defendant shall never take any Challenge for that Cause, and so

in like Cases. But on the Part of the Defendant, any such Matter shall not be alledged, and Process prayed to the Coroners, because he may challenge the Jury for that Cause, and can be at no Prejudice.

Challenge to the Favour.

Challenge concluding to the Favour, when either Party cannot take any principal Challenge, but sheweth Causes of Favour, must be left to the Conscience and Discretion of the Tryors, upon hearing their Evidence to find him favourable or not favourable. But yet some of them come nearer to principal Challenge than other; As if the Juror be of Kindred, or under the Distress of him in the Reversion or Remainder, or in whose Right the Avowry or Justification is made, or the like: These be principal Challenges, because he in Reversion, Remainder, or in whose Right the Avowry or Justification is, is not Party to the Record; otherwise it is, if they were made Parties by Aid, Receipt or Voucher, and yet the Cause of Favour is apparent; so it is of all principal Causes, if they were Party to the Record. Now the Causes of Favour are infinite, and thereof somewhat may be gathered of that which hath been said, and the rest I purposely leave the Reader to the reading of in our Books concerning that Matter. For all which the Rule of Law is, That he must stand indifferent as he stands unsworn.

Favour.

King.

The Subject may challenge the Polls, where the King is Party. And if a Man be outlawed of Treason or Felony at the Suit of the King, and the Party for avoiding thereof alledgeth Imprisonment, or the like, at the Time of the Outlawry, though the Issue be joined upon a collateral Point, yet shall the
Party

Party have such Challenges, as if he had been arraigned upon the Crime it self, for this by a Mean concerneth his Life also.

Propter delictum : As if the Juror be attainted or convicted of Treason or Felony, or for any Offence to Life or Member, or in Attaint for a false Verdict, or for Perjury as a Witness, or in a Conspiracy at the Suit of the King, or in any Suit (either for the King, or for any Subject) be adjudged to the Pillory, Tum-brel, or the like, or to be branded, or to be stigmatized, or to have any other corporeal Punishment whereby he becometh Infamous, (for it is a Maxim in Law, *Repellitur à sacra-mento infamis*,) these and the like are principal Causes of Challenge. So it is if a Man be outlawed in Trespas, Debt, or any other Action, for he is *Exlex*, and therefore is not *legalis homo*. And old Books have said, That if he be excommunicated, he could not be of a Jury. Challenges.
Propter delictum.

Infamous.

Outlawed.

A Bastard may be of a Jury, yet may be challenged if he be of Kindred, *Jenk. Cent. 1. cap. 90.*

See the Statutes of *W. 2.* and *Artic. supra Chartas*, what Persons the Sheriff ought to return on Juries. And see *F. N. B. breve de non ponendis in Assisis & juratis* : and the Register in the same Writ. And see there what Remedy the Party hath that is returned against Law. Who ought to be on Juries.

It is necessary to be known, the Time when the Challenge is to be taken First, He that hath divers Challenges, must take them all at once, and the Law so requireth ; indifferent Trials, and divers Challenges are not accounted double. Secondly, If one be challenged by one Party, if after he be tried in-

different, it is Time enough for the other Party to challenge him. Thirdly, After Challenge to the Array, and Trial duly returned, if the same Party take a Challenge to the Polls, he must shew Cause presently. Fourthly, So if a Juror be formerly sworn, if he be challenged, he must shew Cause presently, and that Cause must rise since he was sworn. Fifthly, When the King is Party, or in an Appeal of Felony, the Defendant that challengeth for Cause, must shew his Cause presently. Sixthly, If a Man in Case of Treason or Felony, challenge for Cause, and he be tried indifferent, yet he may challenge him peremptorily. Seventhly, A Challenge for the Hundred must be taken before so many be sworn as will serve for Hundredors, or else he loseth the Advantage thereof.

Hundredors.

Writ of
Right.

In a Writ of Right, the Grand Jury must be challenged before the four Knights, before they be returned in Court; for after they be returned in Court, there cannot any Challenge be taken unto them.

The Array of
the *Tales*.

Nota, The Array of the *Tales* shall not be challenged by any one Party, until the Array of the Principal be tried; but if the Plaintiff challenge the Array of the Principal, the Defendant may challenge the Array of the *Tales*. After one hath taken Challenge to the Poll, he cannot challenge the Array.

Now it is to be seen how Challenge to the Array of the principal Panel, or of the *Tales*, or of the Polls shall be tried, and who shall be Tryors of the same, and to whom Process shall be awarded.

Coroners.

If the Plaintiff alledge a Cause of Challenge against the Sheriff, the Process shall be directed to the Coroners; if any Cause
against

against any of the Coroners, Process shall be awarded to the rest; if against all of them, then the Court shall appoint certain *Elifors* or *Esfors*, (so named *ab eligendo*) because they are named by the Court, against whose Return no Challenge shall be taken to the Array, because they were appointed by the Court, but he may have his Challenge to the Polls. *Note*, If Process be once awarded for the Partiality of the Sheriff, though there be a new Sheriff, yet Process shall never be awarded to him; for the Entry is, *Ita quod Vicecomes se non intromittat*. But otherwise it is, for that he was Tenant to either Party, or the like.

If the Array be challenged in Court, it shall be tried by two of them that be inpanelled to be appointed by the Court; for the Tryors in that Case, shall not exceed the Number of two, unless it be by Consent. But when the Court names two for some special Cause alledged by either Party, the Court may name others; if the Array be quashed, then Process shall be awarded *ut supra*. If there be a Demur to a Challenge, the Judge before whom the Cause is to be tried, may determine it, or adjourn it to be heard another Time, *Style 464. Vide Bulstr. 1 Part, 114.*

If a Panel upon a *Venire facias* be returned, and a *Tales*, and the Array of the Principal is challenged, the Tryors which try and quash the Array, shall not try the Array of the *Tales*; for now it is, as if there had been no Appearance of the principal Panel; but if the Tryors affirm the Array of the Principal, then they shall try the Array of the *Tales*. If the Plaintiff challenge the Array of the Principal, and the Defendant the Array of the

Tales, there the one of the Principal and the other of the *Tales* shall try both Arrays. For other Matter concerning the *Tales*, see in *Coke's Reports*, Matters worthy of Observation. When any Challenge is made to the

Two Tryors. Polls, two Tryors shall be appointed by the Court; and if they try one indifferent, and he be sworn, then he and the two Tryors shall try another; and if another be tried indifferent, and he be sworn, then the two Tryors cease, and the two that be sworn on the Jury shall try the rest.

Trials of Challenges.

If any of the Jury after some of them be sworn, be challenged, those that are sworn are to say, whether he that is challenged be indifferent or not. But if the first or second Man be challenged, then the Court doth use to appoint some of them, (whom it pleaseth,) that shall be afterwards sworn to try the Indiferency of the Person challenged.

Rules concerning Challenges.

1. All Challenges must be taken before the the Jurors are sworn.

2. If one challenge a Juror, and it be found against the Challenger, he may not challenge the Juror for the second Cause.

3. If one challenge the Array, and it be found against him, he may not afterward challenge any of the Polls, without shewing Cause presently; and this shall be tried presently.

4. No Challenge shall be admitted against the Tryors appointed by the Court.

Trial of Challenges.

If the Plaintiff challenge ten, and the Defendant one, and the twelfth is sworn, because one cannot try alone, there shall be added to him one challenged by the Plaintiff, and the other by the Defendant. When the Trial is to be had by two Counties, the Man-
ner

ner of the Trial is worthy of Observation, and apparent in our Books. If the four Knights in the Writ of Right be challenged, they shall try themselves, and they shall choose the Grand Assize, and try the Challenges of the Parties. If the Cause of Challenges touch the Dishonour or Discredit of the Ju-^{Juror exa-}ror, he shall not be examined upon his Oath; ^{mined.} but in other Cases he shall be examined upon his Oath, to inform the Tryors. If an Inquest be awarded by Default the Defendant hath lost his Challenge; but the Plaintiff may challenge for just Cause, and that shall be examined and tried.

Wheresoever the Plaintiff is to recover *per View*. *visum juratorum*, there ought to be six of the Jury that have had the View, or known the Land in Question, so as he be able to put the Plaintiff in Possession, if he recover.

In *Proprietate probanda*, and a Writ to inquire Challenges for Waste, the Parties have been received to take their Challenges. But passing over many Things touching this Matter, I will conclude with the saying of *Bracton*, *Plures autem aliae sunt causae recusandi juratores, de quibus ad praesens non recolo, sed quae jam enumeratae sunt, sufficient exempli causa*, 1 Inst. 157, 158.

Trait doth signifie as taken out or withdrawn, *Trait*, ^{what} and is applied to a Juror, that is withdrawn by Consent, or removed and discharged by Challenge.

A Juror sick was withdrawn, and another sworn, *Palmer's Rep.* 411.

After Evidence given the King cannot draw ^{King} a Juror, but before he may; but after Evidence on his Prayer, the Court may discharge the Jury, *Keble* 2 Part, 506.

Challenge
lost.

If the Defendant do not appear at the Trial when he is called, he loseth his Challenge to the Jurors, although he doth afterwards appear.

A Wrong
Name.

'Tis a good Challenge to a Juror to say he is returned by another Name in the Panel.

No Freehold.

A Juror appeared and said, he had no Freehold, and prayed that he might not serve, yet the Judge would not spare him; for he may have an Action against the Sheriff for returning him, *Roll. 2 Part Reports, 48*;

The Challenge *pro defectu Hundred.* must be written in Parchment, and the Counsel must arraign it in *French*, upon which the Defendant may take Issue or demur. The Clerk or Associate in Court must call the Jury over, and ask if they have any Lands within the Hundred, or had at the Time of the Array of the Panel, and whether they dwell, or did dwell, in the same. And upon Examination if it appear clearly, that they have no Lands or Tenements, nor dwell in the Hundred; then the Clerk is to mark them by the Side of every of their Names thus, [*præter Hundred.*] but if he find there be two Hundredors, he is to resort back to the *præter Hundred.* and swear them in Order. So that you see the Trial whether Hundredors or not, is determined by the Court's Examination by the Poll severally. But if the Counsel demur, and the other Side join in Demurrer, the Judge of Assizes may affirm the Challenge, and over-rule the Demurrer, or allow the Demurrer good, and proceed to the Trial of the Cause; or if the Judge doubt, it may be determined in Bank, but this is great Delay. If the Challenge be adjudged good, the Court awards, *Que le panel il soit cassé.*

At

At Common Law there ought to have been four Hundredors returned and appear in all Actions, *pro meliori notitia causæ in controversia*, for *vicini vicinorum facta scire præsumuntur*. But by the Statute 35 H. 8. cap. 6. six are to be returned and appear. But since by the Statute 27 Eliz. cap. 6. if two Hundredors be returned and appear, it is sufficient in all personal Actions: But in real Actions there must be six, or else *Remanet pro defectu Jur.*

In Cities, Corporations, Boroughs, and Towns, and Counties, this Challenge cannot be.

Note, In an Information of Forgery to be tried at Bar upon the Attorney-General's Motion, that the Defendant might not challenge for want of Hundredors; it was denied him, *Keble* 3 Part, 740. Hundredors.

The Court shall appoint two Tryors in a Challenge to the Poll, and if they find two indifferent, the first Tryors shall be discharged, and the two that are found indifferent, being sworn to try the Issue, shall also be sworn to try the rest of their Fellows.

At Common Law there used to be returned twenty-four upon the *Venire*, and afterwards a *Habeas Corpora* with a *Decem Tales*; and if a full Jury did not appear or were challenged, then a *Distingas* with an *Octo Tales*, and so to the *Duo Tales*, if there were not a full Jury. And this was the Course until the Statute 35 H. 8. which gives the *Tales de Circumstantibus* at the Assizes, &c. and by the Statute of 5 Phil. & Mar. cap. 7. where the King, Queen or Informer, &c. are Parties. *Tales de Circumstantibus* may be in the Case of Aliens.

A Challenge may be taken to those of the *Tales de Circumstantibus*.

By

By the Statute 33 Ed. 1. The King and those who prosecute for him, must shew their Cause of Challenge, as betwixt Party and Party, and left to the Discretion of the Justices.

The King or any one authorized for him may release his Challenge. Where the Party may challenge, the King may challenge.

'Tis no Challenge to say, the Juror is the King's Tenant, or that he is favourable to the King; but it is good to say, the Sheriff or Juror bears Grudge or Malice to the Defendant where the King is Party. If the Juror hath any Freehold 'tis sufficient, although not to 40 s. a Year: For the Statute which in-joins that, speaks only betwixt Party and Party.

The first who challenges, be he Plaintiff or Defendant, shall have the Preference and Advantage of his Challenge. If a Juror be once challenged and withdrawn upon the Principal, he cannot serve upon the *Tales*; if he doth 'tis Error, and Judgment may be stayed; and so if he be challenged, and a Jury remain *pro defectu Juratorum*, if he be sworn upon a new *Distingas*, 'tis Error, not helped by any Statute of *Jeofails*, and a Mis-trial, and a *Venire facias de novo* may be awarded, *Cro. El. f. 429 Whitby's Case*.

Essofors may be sworn in some Cases to return and impanel all Juries, as should upon any *Venire facias*, *Habeas Corpora* or *Distingas Jur.* come to their Hands impartially, indifferently and without Favour or Affection, nor at the Denomination of any Person.

The Record of Attainder, Conviction, Ex-communication, Outlawry, &c. or a Copy thereof ought to be produced to prove the Cause of Challenge thereupon.

Where Bodies Politick or Corporate are concerned, a Challenge may be taken which arises from the Individuals, as Brother to one of the Prebendaries is a good Challenge, where the Dean and Chapter are Parties, &c. *Hob. 87.* So a Parishioner, where the Right of the Church comes in Question at the Suit of the Parson, *17 Aff. 15.*

In High Treason the Prisoner may peremptorily challenge to the Number of thirty-five, which is under the Number of three Juries; but in Petit Treason, Murder or Felony, the Number is reduced to twenty. The Prisoner may challenge any that are Witnesses against him.

Where the King is Party, the Defendant must shew the Cause of his Challenge instantly.

After a Challenge for Cause, the Prisoner may challenge the same Person peremptorily.

One of the Petty Jury was challenged, because he had been of the Grand Jury, and found the Bill, *Siderfin 244.* 'Tis a good Challenge. Grand Jury.

In an Information of Forgery, the Defendant challenged one of the Jury, for that the Prosecutors had been entertained lately at his House: And this was admitted to the Favour, tho' against the King. The Counsel for the King challenged another, and were press'd to alledge the Cause, for *31 Ed. 1.* takes away the general Challenge; but the Court ordered the Panel to be first gone through, and if there were enough, the King should not shew any Cause, *1 Vent. 305.* Prosecutor entertained by a Juror, Cause of Challenge. Challenge by the King, without shewing Cause.

The Jurors were challenged by the Prisoners, because they had already given a Verdict, and found others guilty who were indicted in the same Indictment: But held to be no Cause of Challenge, *Kelynge 9.* Jurors found others guilty in the same Indictment: No Cause of Challenge. One Challenge.

One challenged thirty-six, and adjudged to be hang'd.

Tryors of a Challenge to the Favour, the Oath.

How a Juryman shall be examined on a *Voir dire*.

One was arraigned of Felony, who challenged thirty-six peremptorily; and adjudg'd to be hang'd, and not press'd to death, *Kelynge* 36.

Upon a Trial at Bar, *Trin. 1 W. & M.* the Question was, Whether the Fair, called *Way-bill* Fair, should be kept at *Way-bill*, or at *Anderry*? And one of the Jury was challenged, because he lived at *Way-bill*: This being a Challenge to the Favour, two of the Jurors were sworn to be Tryers, and their Oath was, *You shall well and truly try whether A. (the Juryman challenged) stand indifferent between the Parties to this Issue, Salkeld* 144.

Cook being indicted for High Treason, and the Jury called, he offered to ask the Jurors, in order to challenge them, if they had not said he was guilty, or would be hanged? *Et per Cur'*. This is a good Cause of Challenge, but then the Prisoner must prove it by Witnesses, and not out of the Mouth of the Juryman: A Juryman may be ask'd upon a *Voir dire*, whether he hath any Interest in the Cause, or whether he hath a Freehold, &c? For these do not make him criminal; but you shall not ask a Witness or a Juryman, Whether he hath been whipped for Larceny, or convict of Felony? Or whether he was ever committed to *Bridewell*, &c? because that would make a Man discover that of himself which tends to make him infamous; and in this Case the Answer might charge him with a Misdemeanor. *Et per Powell Justice*. In a Civil Cause you may perhaps ask a Man if he has not given his Opinion before-hand upon the Right? For he might have done that as Arbitrator between the Parties, *Salkeld* 153.

Precedents containing the Forms of Challenges to the Array, &c. And the Proceedings thereupon. Pleas *Puis le Darrein Continuance*; Bills of Exception, &c.

A Form of Challenge to the Array.

‘ET nunc ad hunc diem scilicet, &c. venit prædict’ A. Quer’ & B. Defend’ per attornat’ suos, & Juratores fuer’ Impanellat’ & demand’ & venerunt, & inde prædict’ B. Calumniavit Arraiam’ panell’ prædict’ quia, &c.

This must be read by the Counsel in French, and delivered to the Clerk to read it in Latin.

A Challenge to the Array, because the Sheriff is Cousin, &c.

‘Et super hoc idem *Henricus Vernon* calumpniat Arraiamentu’ Panelli prædict’ quia dic’ quod Panellum illud arraiat’ fuit per quendam *Johannem Zouch* Militem jam & te’e Arraiament’ præd’ fact’ Vic’ præd’ Com’ *Derb’* qui quidem Vic’ est consanguineus præd’ *Johannis Maners*, viz. filii *Georgii Zouch* Armig’, filii *Johannis Zouch* Mil’, fil’ *Johannis Zouch* Armig’, filii *Johannis Zouch* Armig’, filii *Willielmi Domini Zouch*, filii *Alan Dom’ Zouch*, filii *Willielmi Domini Zouch*, filii *Elizabethæ*, filia *Willielmi Domini Roos*, Patris *Willielmi Domini Roos*, Patris *Thome Domini Roos*, Patris

' tris *Elia noræ* Matris *Georgii Maners* Militis, Pa-
 ' tris *Thome* Comitis *Rutland*, Patris prædict'
 ' *Johannis Maners*. Et hoc paratus est verifi-
 ' care unde petit Judicium ac quod panellum
 ' prædict' cassetur, &c. quæ quidem calum'
 ' per prædict' *Tho. Stanley* dedic' per *N. Sturley*
 ' de *Beachiff* Armig' & *R. F. de T.* Ar' Tria-
 ' tores ad hoc electos & juratos comperta est
 ' vera. Ideo panellum prædict' cassetur, &
 ' amoveatur, &c. *Coke's Entries*.

A Challenge because the Sheriff is Tenant, &c.

' Et super hoc idem *Johannes* Dom' *St. John*
 ' dic' quod *J. D.* Ar' Vic' Com' præd' jam
 ' existit, quodque idem *J. D.* tenet duodecim
 ' acras prati cum pertin' in *Budenham* in Com'
 ' prædict' de ipso *Johanne* Domino *St. John*
 ' ad voluntatem per reddit' 40 s. eidem *Jo-*
 ' *hanni* Domino *St. John* annuatim solvend' Et
 ' ea de causa petit breve Domine Regine de
 ' *Ven. fac.* hic duodecim, &c. ad triandum
 ' exitum prædict' superius junct' Coronatori-
 ' bus ejusdem Domine Regine in Com' præ-
 ' dict' dirigend', &c. Super quo prædict' *Tho.*
 ' dic' quod prædict' *Jo. D.* non tenet præ-
 ' dict' xii acras prati cum pertin' nec ali-
 ' quam inde parcel' de præfat' *J. Domino*
 ' *St. John* ad voluntat' prout idem *Johannes*
 ' Dominus *St. John* superius allegavit. Ideo
 ' non obstante Calumpnia prædict' *Jo. Do-*
 ' mini *St. John* ad præfat' Vic' præceptum est
 ' eidem Vic' quod *Ven. fac.* hic, &c. *Coke's*
 ' *Entries* 397.

A Precedent of a Challenge for Default of Hundredors, which hath been several Times made use of at the Assise.

‘ Et super hoc prædict’ A. B. per C. D. Ar-
 ‘ torn’ suum ven’ & Calumpn’ Arraiament’
 ‘ panell’ prædict’ quia dic’ quod Villa de Dale
 ‘ in Com’ prædict’ in qua quidem Villa causa
 ‘ Actionis oritur & in narratione præd’ quer’
 ‘ locat’ & orir’ suppon’ est & tempore Arraia-
 ‘ menti panelli illius fuit & adhuc existit in-
 ‘ fra hundred’ de Downs in Com’ prædict’
 ‘ quodq; modo Vic’ Com’ prædict’ non Re-
 ‘ torn’ seu impanellavit aliquos Hundredores
 ‘ de Hundred’ de Downs prædict’ ad triand’
 ‘ exit’ inter partes prædict’ modo junct’ nec
 ‘ Jur’ modo Impanellat’ & retorn’ habent seu
 ‘ aliquis eorundem Jur’ habuit vel modo ha-
 ‘ bet aliquas terras seu tenementa infra hun-
 ‘ dred’ de Downs præd’ nec habent habuer’ seu
 ‘ aliquis eorundem Jur’ habuit tempore Ar-
 ‘ raiamenti panelli prædict’ seu unquam antea
 ‘ vel postea seu habitant vel commorant aut
 ‘ aliquis eorundem habitabat vel commorab’
 ‘ infra hundred’ prædict’ modo vel tempore
 ‘ Arraiamenti panelli illius Et hoc paratus
 ‘ est verificare unde pet’ Judicium Et quod
 ‘ panellum illud Cassetur, &c.

*This must be under Counsel’s Hand, and the Pro-
 ceedings herein you may read before; if they de-
 mur, thus,*

Moratur in Lege

W. T.

Joinder in Demurrer

G. D.

M

The

*The Form of a Challenge made by the Defendant,
because the Plaintiff is the Sheriff's Cousin.*

‘ Et super hoc prædictus Defendens per
‘ A. B. Attorn’ suum ven’ & Calumpn’ Arraiam-
‘ ment’ panelli prædict’ quia dic’ quod panel-
‘ lum illud fact’ & arraiat’ fuit per C. D. Ar’
‘ modo & tempore Arraiament’ panelli præd’
‘ Vic’ Com’ prædict’ qui quidem Vic’ est Con-
‘ sanguineus E. H. Gen’ modo dimissionis
‘ quer’ in Narratione prædict’ quer’ mentio-
‘ tionat’ videlt’ filius G. H. Gen’ filii K. L. filiae
‘ M. N. filii O. P. Patris Q. R. Matris præd’
‘ E. F. modo dimissoris quer’ in nar’ prædict’
‘ nominat’ Et hoc paratus est verificare unde
‘ pet’ Judicium & quod’ panellum illud casse-
‘ tur, &c.

*If the Plaintiff deny the Kindred and Affinity,
then thus,*

Nient Cousin par le manner
W. T.
est Cousin
G. D.

*Then are two or more Triors sworn, but seldom
more than two, and (after they have heard the
Proofs and Evidence given to make good the Defen-
dant's Plea) they give their Verdict accordingly.*

*Note, The Plaintiff may, if he please, demur up-
on the Challenge.*

*A Challenge to the Array, because no Knight was
returned upon the Jury.*

‘ Et super hoc prædictus Comes per A. B.
‘ Attorn’ suum ven’ & Calumpn’ Arraiament’
pa-

‘ panelli Affisæ prædict’ quia dic’ quod ipse est
 ‘ & tempore Arraiamenti panelli illius & an-
 ‘ tea fuit & adhuc est unus magnat’ & parium
 ‘ hujus Regni *Angliæ* & vocem & locum in
 ‘ quolibet Parlamento ejusdem Regni habens
 ‘ Et quod Arraiament’ Affisæ panelli prædict’
 ‘ arraiat’ fuit per C. D. Mil’ nuper Vic’ præd’
 ‘ Com’ E. nullo Milite in eodem pannello Ar-
 ‘ raiament’ illius no’iat’ & retorn’ existen’ si-
 ‘ cut esse debuit secundum legem hujus Regni
 ‘ *Angliæ* Et hoc paratus est verificare unde
 ‘ pet’ Judicium Et quod panellum illud cas-
 ‘ setur, &c.

‘ Vies Tiel Challenge in le Lieur de
 ‘ Monsieur Plowden, & Demurrer sur ceo,
 ‘ joinder in Demurrer & Judgment que le
 ‘ panel soit casse en le Case del Count de
 ‘ Darby, fol. 117.

*A Challenge against the Sheriff for returning the
 Jury at the Instance, Request and Denomination
 of the Plaintiff.*

‘ Et super hoc eadem A. B. per C. D. Ar-
 ‘ torn’ suum ven’ & Calumpn’ Arraiament’
 ‘ panelli ejusdem Jur’æ quia dic’ quod panel-
 ‘ lum illud fact’ & arraiat’ fuit per E. H. Mil’
 ‘ modo Vic’ Com’ prædict’ & Ministros suos
 ‘ ad denominationem & promotionem ipsius
 ‘ quer’ in favorem ejusdem quer’ & hoc para-
 ‘ tus est verificare unde petit Judicium & quod
 ‘ panellum illud cassetur, &c.

‘ To which the Plaintiff may plead that the
 ‘ Array of the Panel prædict’ bene & æqualit’
 ‘ factum & arraiat’ fuit per prædict’ Vic’

‘ & Ministros suos, &c. juxta officii sui de-
bitum.

*Or the Plaintiff, if he will, may confess it ;
But if he plead, then the Judges immediately as-
sign Tryors to try the Array, which seldom exceed
two, who being chose and sworn, the Associate
or Clerk in Court doth declare and rehearse unto
them the Matter and Cause of the Challenge, and
after he hath so done, concludes to them thus. And
so your Charge is to enquire whether it be an
even and impartial Array, or a favourable
one : And if they affirm it, then the Clerk enters
underneath the Challenge.*

Affirmatur.

But if the Tryors find it favourable, then thus,

Calumpnia vera.

*A Challenge, because that the Town is within an
Hundred of which the Plaintiff is Lord, and
prays a Writ to the next Hundred.*

‘ Et super hoc præd’ A. dic’ quod præd’ Vil-
‘ la de Dale in qua transgr’ præd’ facta fuit est
‘ infra Hundred’ de B. Et quod ipse est Do-
‘ minus ejusdem hundredi quodque omnes
‘ lib’ Tenentes infra hundredum illud sunt in-
‘ fra distriktionem ipsius A. Et ea de causa
‘ pet’ bre’ Dom’ Regis de Venire faciend’ hic
‘ xii, &c. ad triand’ exitum prædictum de
‘ prox’ visn’ in Com’ prædict’ extra hundred’
‘ prædict’ Villæ de B prox’ adjacen’ Vic’ Com’
‘ præd’ dirigend’ Et quia præd’ Defendens hoc
‘ non dedit ei conceditur, &c. J’o præcept’
‘ est Vic’ quod Venire fac’ hic in Octab’
‘ Sancti

‘ Sancti Hillarii xii, &c. de prox’ visn’ in
 ‘ Com’ præd’ extra hundred’ præd’ prædictæ
 ‘ Villæ de Dale prox’ adjacen’ per quos, &c.
 ‘ Et qui nec, &c. ad Recogn’, &c. qui tam, &c.

*Challenge because the Sberiff and two Coroners are
 Tenants of the Plaintiff, and a Venire facias
 awarded to the rest of the Coroners.*

‘ Et super hoc prædict’ A. B. dic’ quod tam
 ‘ præd’ C. D. Miles nunc Vic’ Com’ prædict’
 ‘ quam E. F. & G. H. duo Coron’ sunt Te-
 ‘ nentes ipsius nunc I. & infra districtionem
 ‘ suam Et ea de causa pet’ Breve ipsius Do-
 ‘ mini Regis de Ven. Fac. hic xii, &c. E. A. &
 ‘ R. P. resid’ Coron’ ejusdem Domini Regis
 ‘ in Com’ præd’ dirigend’ ad triand’ exit’ præd’
 ‘ & quia prædict’ W. hoc non dedic’ ei conce-
 ‘ ditur, &c. Ideo præcept’ E. A. & R. P. quod
 ‘ Ven. Fac. hic, &c.

*Challenge, where after the last Continuance the
 Cousin of the Plaintiff is made Sberiff after Issue
 joined.*

‘ Quia tam, &c. Ad quem diem hic ven’
 ‘ partes, &c. Et Vic’ non misit breve Et su-
 ‘ per hoc prædictus Quer’ dic’ quod post ulti-
 ‘ mam continuationem placiti videl’ post
 ‘ Octab’ Sancti Michaelis ultim’ præterit’ de
 ‘ quo die loquela præd’ ult’ continuat’ fuit hic
 ‘ usque ad hunc diem scilicet tali die ultimo
 ‘ præterito Dominus Rex nunc per Literas
 ‘ Patentes commisit cuidam A. B. Militi cu-
 ‘ stodiam Com’ præd’ quarum quidem Litera-
 ‘ rum Paten’ pretextu idem Vic’ Com’ illius
 M 3 ‘ jam

‘ jam existit Qui quidem A. B. est Constan-
 ‘ guineus prædict’ Quer’ vizt’ fil’, &c. Et ea
 ‘ de causa pet’ breve Domini Regis de Venire
 ‘ fac’ hic xii, &c. Coron’ dic’ Dom’ Regis
 ‘ Com’ prædict’ dirigend’ Et quia prædict’
 ‘ Defendens non dedicit ei conceditur, &c.
 ‘ Et præcept’ est Coron’ Dom’ Regis Com’
 ‘ prædict’ quod Ven’ fac’, &c.

Challenge because the Sheriff is of Counsel with the Plaintiff, and hath received Fees, and the Defendant doth deny the Challenge, therefore the Venire facias awarded to the Sheriff notwithstanding.

‘ Et super hoc prædictus Quer’ dic’ quod
 ‘ quidam A. B. Vic’ Com’ præd’ modo existit
 ‘ qui quidem A. B. est de consiliis ipsius Quer’
 ‘ & habet de eodem Quer’ annum Redditum
 ‘ sive feodem xx l. Et ea de causa pet’ breve
 ‘ Dom’ Regis de Venir’ faciend’ hic xii, &c.
 ‘ Coron’ Dom’ Regis Com’ prædict’ dirigend’
 ‘ Et quia prædictus Defendens hoc dedic’
 ‘ Ideo non obstante allegatione prædict’ Quer’
 ‘ præcept’ est Vic’, &c.

Challenge, because the Plaintiff is Brother to the Sheriff.

‘ Et super hoc idem Querens dicit quod
 ‘ A. B. Miles Vic’ Com’ prædict’ existit & Fra-
 ‘ ter ejusdem Quer’ & ea de causa pet’ breve
 ‘ Domini Regis de Venire faciend’ hic xii,
 ‘ &c. Coron’ dic’ Dom’ Regis Com’ prædict’
 ‘ dirigend’ Et quia prædict’ defendens hoc
 ‘ non dedicit conceditur, Ideo, &c.

Challenge

Challenge where the Plaintiff is Sheriff, and one of the Coroners is his Tenant.

‘ Et super hoc præd’ Quer’ dic’ quod ipse
 ‘ est Vic’ Com’ prædict’ & quod sunt in eodem
 ‘ Com’ duo Coron’ videlicet R. H. & R. D.
 ‘ quodque idem R. H. unus Coron’ ejusdem
 ‘ Com’ tenet de ipso quer’ unum Messuagium,
 ‘ &c. per fidelitatem & annuum reddit’ singu-
 ‘ lis annis ad festa, &c. per equales portiones
 ‘ solvend’ Et eis de causis pet’ breve Dom’ Re-
 ‘ gis de Ven’ fac’ hic xii, &c. præfat’ R. D. alt’
 ‘ Coron’ Com’ præd’ dirigend’ & quia, &c. con-
 ‘ ceditur Et præcept’ est eidem R. D. qd’, &c.

Pasch. 24 H. 8
 Rot. 138.

Another Challenge to the same Purpose.

‘ Et super hoc idem quer’ dic’ quod A. B.
 ‘ Vic’, &c. tenet decem acras terræ cum per-
 ‘ tin, &c. de ipso quer’ ut de Manerio, &c. per
 ‘ fidelitatem, &c. Et ea de causa pet’ breve ut
 ‘ supra.

Pasch. 20 and
 21 H. 8. Rot.
 424.

Challenge, because the Wife of the Plaintiff is Kin to the Sheriff’s Wife.

‘ Et sup’ hoc idem Quer’ dic’ quod prædicta
 ‘ Bridgitta nunc uxor H. I. modo Vic’ Com’
 ‘ prædict’ Consanguinea A. uxoris præfat’ quer’
 ‘ videlt’ filia M. sororis ipsius A. uxoris præfat’
 ‘ quer’ Et ea de causa pet’ breve, &c. Cor’, &c.

Mich. 11 H. 7
 Rot. 453.

Challenge, because the Plaintiff is the Sheriff’s Servant.

‘ Et super hoc idem Querens dicit quod
 ‘ ipse est serviens & de lib. R. T. Militis
 M 4 ‘ modo

‘ modo Vicecomitis Com’ prædict’ & ea de
 ‘ causa, &c.

*Challenge after the Jury impanelled, returned and
 called, because the Prier in Aid is Sheriff, and of
 the Counsel of the Plaintiff, and a Distringas
 Jur’, with a 10 Tales Coron’ awarded.*

‘ Et modo hic ad hunc diem ven’ tam præd’
 ‘ R. ac præd’ J. S. & W. V. qui se separatim
 ‘ junxer’, &c. quam præd’ W. M. per Attornat’
 ‘ suu’ præd’ & Jur’ inde impanellat’ exact’ qui-
 ‘ dam eor’ ven’ & quidam eor’ non ven’ prout
 ‘ patet in panello, &c. & sup’ hoc præd’ R. H.
 ‘ ac præd’ J. S. & W. V. qui separatim junxer’,
 ‘ &c. dic’ quod præd’ J. S. modo Vic’ Com’
 ‘ præd’ existit quodq; idem J. S. est de feodo
 ‘ præd’ W. & consilio in præmissis & aliis nego-
 ‘ tiis suis & aliis de causis pet’ breve de distring’
 ‘ Jur’ Jur’ præd’ unacum decem talibus de visu
 ‘ præd’ eis imponend’ Coron’ Dom’ Reg’ Com’
 ‘ præd’ dirigend’ super quo quæsit’ est à præd’
 ‘ W. M. siquid pro se habeat vel dic’ sciat quare
 ‘ breve illud Coron’ Dom’ Reg’ Com’ præd’ di-
 ‘ string’ Jur’ Jur’ præd’ unacum decem talibus
 ‘ de visu præd’ eis imponend’ ratione præmissor’
 ‘ fieri non debet quia dic’ quod non Ideo præ-
 ‘ cept’ est Coron’ Dom’ Reg’ præd’ qd’ distring’
 ‘ Jur’ Jur’ præd’ per omnes terras, &c. & qd’ de
 ‘ exit’, &c. Ita qd’ habeat corpora, &c. ad fac’
 ‘ Juram præd’ Et appon’ ei decem tales, &c.

Sur Hill.
 9 H. 8. 343.

*Challenge, because the Plaintiff is one of the Sheriffs
 of London, and the Venire fac’ awarded to
 the other Sheriff.*

‘ Et super hoc prædictus Querens dic’ quod
 ‘ ipse ap’ quidam Johannes Blant Miles sunt
 ‘ Vic’

' Vic' London & pro eo quod ipse est unus Vic'
 ' London pet' quod processus de Venire fac' hic
 ' xii, &c. ad triand' exit' prædictum præfat'
 ' f B. tantum dirigetur, &c. & quæsit' est præ-
 ' fat' defend' siquid dicere sciat quare proces-
 ' sum illi præfat' *Johanni Blunt* altero Vic', &c.
 ' tantum ea ratione fieri non debet qui dic' qd'
 ' non Ideo præcept' est eidem *Johanni Blunt*
 ' altero Vic', &c. quod Venire fac' in Octab'
 ' Pur' Ita quod prædict' querens in nullo se
 ' intromittat xii, &c. per quos, &c. & qui
 ' nec, &c. ad recogn', &c. qui tam, &c.

Challenge to the Deputy Sheriff, because he impanelled and returned the Jury at the Instance and Denomination of the Plaintiff.

' Et super hoc prædict' defendens Calumpn'
 ' Arraiamentum panelli Juratæ præd' eo quod
 ' panellum illud factum & arraiat' fuit per
 ' T.W. Sub-Vic' Com' prædict' ad denomina-
 ' tionem præd' quer' in favorem & promo-
 ' tionem ejusdem quer' quæ quidem Calumpnia
 ' per Triatores ad hoc elect' & Jurat' Com-
 ' perta est vera Ideo, &c.

Challenge by the King's Serjeant upon an Indictment of Felony, because the Sheriff returned the Jury of Life and Death, at the Instance and Request, and Denomination of the Prisoner.

' *Laurentius B.* nuper de *A.* in Com præd'
 ' Gen' capt', &c. Recitando totum indicta-
 ' mentum usq; Ideo fiet inde Jura', &c. super
 ' quo *A. B.* serviens Dom' Regis ad legem pro
 ' eodem Domino Rege Calumpn' Arraiament'
 ' panelli Jurat' prædict' quia dic' quod panel-
 ' lum

‘ Iura illud fact’ & arraiat’ fuit per *Henricum*
 ‘ *Fortescue* Vic’ Com’ prædict’ ad denomina-
 ‘ tionem præfat’ *Laurentii* & in favorem & pro-
 ‘ motionem ejusdem *Laurentii* quæ quidem Ca-
 ‘ lumpn’ per Triatores inde Jur’ compert’ est
 ‘ vera Ideo panellum amoveatur & cassetur,
 ‘ &c. & Venire fac’ awarded to the Coroner.

*Challenge by the King’s Serjeant for the King to
 some of the Jury, for Default of Freehold, to
 the Value of 40 s. per Annum.*

‘ Super quo facta publica proclamatione pro
 ‘ Domino Rege, &c. ac quidam *J. G. Mil’*
 ‘ serviens dic’ Dom’ Regis ad legem nunc pro
 ‘ eodem Dom’ Rege ven’ & quidam Jur’ mo-
 ‘ do comparen’ videlt’ *J. L.* in Juram’ præd’
 ‘ Jurat’ existit Et quia resid’ Jur’ ejusdem Jur’
 ‘ modo Comparen’ non habent terras seu te-
 ‘ nementa in Com’ præd’ ad annum valorem
 ‘ xl s. a panel’ illo penitus extrahuntur, &c.

Entry of a
 Challenge af-
 ter Issue join-
 ed, where the
 Sheriff is
 amoved, &c.

Between
Barkley and
Jefferson.

Mich. 23 and 24 Eliz. Rot. 109. Therefore
 came thereupon the Jury before our Lady the
 Queen at *Westminster*, the Day, &c. who nei-
 ther, &c. to Recognize, &c. because as well,
 &c. the same Day is given to the said Parties
 there, &c. at which Day, before the said
 Queen at *Westminster*, came the said Parties by
 their said Attorneys, and the Sheriff sent not
 the Writ; and upon this, the same Plaintiff
 saith, That after the last Continuance of the
 said Plea, that is to say, after the *Saturday*
 next after, &c. now last past; from which
 Day the said Plaintiff was continued here un-
 til this Day, that is to say, the Day, &c.
R. P. Esq; late Sheriff of the said County of *E.*
 from

from the same Office of Sheriff of that County was duly amoved; and the said Queen now by her Letters Patent, hath committed unto one *T. P.* Knight, the Custody of the said County of *E.* by Pretence of which said Letters Patent, the said *T. P.* now remaineth Sheriff of that County, which said *T. P.* of *A.* at *A.* aforesaid, took his Wife *Anne*, of the Blood of *M.* now the Wife of him the Plaintiff; that is to say, the Daughter of *R. D.* the Son of *W. D.* Knight, Father of *Anne*, Mother of the said *M.* now Wife of him the Plaintiff; which said *T. P.* Knight. and *A.* had Issue between them *A. P.* yet alive, and in full Life remaining, at *A.* aforesaid, and this he is ready to prove, &c. And for that Cause he prayeth a Writ of our Lady the now Queen, of *Venire fac.* to try the said Issue in Form aforesaid joined, to be directed to the Coroners of the said County; and because the said Defendant doth gain-say, and doth not grant Challenge that to be true, therefore notwithstanding the gain-said. same Challenge, a Command is to the Sheriff, that he make to come Twelve, &c. of the *Vifne* of *B.* by whom, &c.

Easter Term, 38 H. 8. Rot. 558. And here-
upon the Defendant doth Challenge the Ar-
ray of the Panel of the said Jury, because he
saith, That that Panel was made and arrayed
by *A.* and *C.* Coroners of the said County,
at the Denomination and in Favour of the
said Plaintiff, and this he is ready to ve-
rify, and requesteth that the same Panel
may be quashed. And the said Plaintiff saith,
That the said Panel by the said Coroners was
well and equally made; and not at the Deno-
mination, or in Favour, nor in Promotion of
the said Plaintiff; whereupon the said Justices
by

Challenge t
the Array, b
cause the C
roners mad
the Panel
the Denom
nation of
Plaintiff.

by the Consent of the said Parties, did chuse and assign *D.* and *E.* two of the said Jury now appearing, to try the said Challenge; which said Tryors being elected and tried, say upon their Oaths, That the said Panel was well and faithfully made and arrayed by the said Coroners, and not at the Denomination, neither in Favour, nor in Promotion of the said Plaintiff; whereupon the Jurors of the said Jury being called, tried and sworn, say, &c.

A Precedent of a Challenge to the Array.

May it please you, *Mr. Baron*, This Enquest you ought not to take, for that *Sir John Ramsden* Knight, Sheriff of the County of *York*, who did return the Panel between the said *A.* Plaintiff, and *B.* Defendant, is Cousin to the Plaintiff, &c. and shew how of Kin, &c. and so where the Challenge is for lack of Hundredors, or other principal Challenge, put it down, &c. and this he is ready to aver, whereof he prays Judgment, and that the said Panel be quashed.

Or thus, And now at this Day *S.* &c. comes the aforesaid *J. S.* Plaintiff, and *J. B.* Defendant by their Attorneys, and the Jurors also impanelled and demanded did come, and thereupon the said *J. B.* doth challenge the Array of the Panel aforesaid, because, &c.

This must be put in Writing, but under Counsel's Hand; where the Challenge is to the Poles, it is a short Way by a verbal Challenge; see the Learning of this is excellent and copious in our Book.

A Precedent of a Plea after the last Continuance.

And now at this Day, &c. comes such a one Defendant, by J. C. his Counsel, and saith, This Action the Plaintiff against the Defendant ought not to maintain; for that after the *Quinden* of the Holy Trinity last past, from which Day until such a Day in *Michaelmas* Term next, unless the Justices of Assizes come before such a Day, &c. the Action aforesaid is continued, &c. the Plaintiff by his Deed dated, &c. did Release, &c. and shew, &c. the Matter what it is, whether in Abatement in Bar dilatory, or peremptory, as the Case is, &c. and this he is ready to aver.

Note, Brook in his Abridgment, tit. Continuance, 61 and 82. says, That after the Inquest is awarded to inquire of Damages, the Defendant cannot plead a Plea Puis le darrein Continuance, because he hath no Day in Court to plead.

The Day of *Nisi prius* and Day in Bank are all one; so that a Release made betwixt these Days cannot be pleaded in Bank; but it seems that a Release made between the Day of the *Venire facias* returned, and the Writ of *Nisi prius* awarded, and the Day of the *Nisi prius* may be pleaded at the Day of the *Nisi prius*, but not after the Verdict, 21 H. 6. f. 10. Bro. tit. *Furor*, &c. 31. tit. *Continuance*, 76, 42. 27, 13.

A Man shall have but one Plea after the last Continuance; for the Plaintiff shall not be delayed *ad infinitum*, 16 H. 7. 11. Bro. tit. *Continuance*, 59, 41. 45, 46. 5, 21.

After

After the Inquest taken by Default, and before Judgment, the Defendant came and pleaded an Arbitrement made after the last Continuance; and by the Opinion of the Court, he had no Day in Court to plead this Plea, and it was said, That he could plead no Plea in such Case, but as *Amicus Curiae*; and of Matter apparent he shall be received; otherwise, he must resort to his *Audita Querela*, 21 H. 7. 33. *Brook, ibid.* 38.

But if the Jury remain for Default of Jurors, the Defendant may plead a Release, &c. at the Day in Bank *Puis le darrein Continuance*, although he did not offer it at the *Nisi prius*, otherwise if the Jury had been taken at the *Nisi prius*, 22 H. 6. 1. *Brook ibid.* 30.

If it be pleaded at the *Nisi prius*, the Court may record the Plea, and discharge the Inquest, and give Day to the Parties in Bank, *ibid.* 34. 8.

In Debt after Issue joined, the Defendant at the *Nisi prius* pleaded Payment of Part after the latter Continuance in Abatement. And the Jury being discharged, and the Plea adjourned in Bank, for that no Place of Payment was pleaded, the Plaintiff had Judgment to recover his Debt, because after Issue joined, no *Respondeas ouster* can be awarded, L. 5 E. 4. 139. *Aleyn's Rep.* 69. in the Case of *Beaton and Forrest*.

Now, although when Difficulty arises in the Evidence, the Matter is most commonly (of late) found specially, and Demurrers on the Evidence are seldom used; yet inasmuch as it is sometimes done, and that our Practicer may be prepared with an Authentick Precedent for that Purpose, I shall transcribe one out of *Coke's Entries*, f. 144. viz.

‘ Postea die & loco infracontent’ coram *J. A.* Postea, ff.
 ‘ *cob*o Dyer Milite, Capitali Justitiar’ Dom.
 ‘ Regine de Banco & Nicholao Barham uno
 ‘ servient’ dict’ Domine Regine ad Legem
 ‘ Justic’ ipsius Domine Regine ad Assisas in
 ‘ Com’ M. Capiend’ assign’ per formam Sta-
 ‘ tuti, &c. Ven’ tam infranominat’ *J. A.* quam
 ‘ infra script’ H. C. per attornat’ suos infra con-
 ‘ tent’ & Jur’ Jur’ unde infra fit mentio Exact’
 ‘ similiter vener’ Qui ad veritatem de infra con-
 ‘ tent’ dicend’ electi, triati, & Jurati fuer’
 ‘ super quo * præd’ H. per quendam *J. B.* de
 ‘ Consilio ipsius H. C. manutentione exitus
 ‘ interius junct’ Coram præfat’ Just’ Jur’ præ-
 ‘ dict’ in Evidentiis ostens’ & dic’ quod, &c.
 ‘ [*Here recite the Evidence truly*] unde petit
 ‘ Judic’ & quod Jur’ præd’ veredict’ suum de &
 ‘ super infra content’ pro ipso H. reddant, &c. præd’ qui
 ‘ E. D. De
 ‘ Consilio præ-
 ‘ dict’ *J. A.*
 ‘ produxit
 ‘ quosdam *J. D.*
 ‘ & T. B. ex
 ‘ parte Quer’
 ‘ ad proban-
 ‘ dum exit.
 ‘ præd’ qui
 ‘ quidem *J. D.*

jurat. existen dedit in Evident’ Jur’ præd’ & juravit in his Anglicanis
 verbis, videlicet, *That upon Discourse, &c.* [*and so recite his Evidence.*]
 Et præd’ T. E. jurat’ existen dedit in Evident. Jur’ præd’ & juravit
 in his Anglicanis verbis, videlicet, *That, &c.* [*And so recite the Evi-
 dence,*] Et supra inde H. P. ex consilio Def. dixit quod materia præd’
 superius in eadem dat’ non fuit sufficiens in lege ad manutenend’ exit’
 præd’ Et moratur in Lege super Evidenc’ præd. Et hoc, &c. Et pet’,
 &c. Ex præd’ causis ex parte præd. Quer’ dixit quod fuit sufficiens
 in Lege Et hoc, &c. Et pet’, &c. super quo Jur’ præd’ super sacra-
 ment’ suum dic’ si Lex sit cum Quer’ quod præd’ Def. est Cul. de in-
 fra content’ modo & forma prout præd’ quer’ interius narravit quodque
 præd’ quer’ occasione præmis. sufficient’ dampn’ ad 11 l. ultra m. &
 custag. Et pro Mis. & custag. illis 40 s. Et si Lex sit cum Def.
 Jur’ præd’ dic’ quod præd’ Def. non est cul’ modo & forma prout præd’
 quer’ interius versus eum queritur.

‘ Et præd’ *J. A.* per quendam C. *J.* de
 ‘ Consilio suo dic’ quod materia præd’ per
 ‘ præfat’ H. C. Jur’ præd’ superius in Eviden-
 ‘ tiis ostens. minus suff. in lege existit ad pro-
 ‘ band’ exitum interius Junct’ pro parte ejus-
 ‘ dem H. quodque ipse ad materiam illam in
 ‘ forma

‘ forma præd’ in Evident’ ostens. necesse non
 ‘ habet nec per legem terræ tenet’ respondere,
 ‘ & hoc paratus est verificare, unde pro defe-
 ‘ ctu sufficient’ mater’ Jur’ præd’ in hac parte
 ‘ ostens. idem J. petit Judic’ & quod Jur’ de
 ‘ Verdict’ suo super Exit’ præd’ reddend’ exo-
 ‘ neretur & debitum suum infra spec’ una cum
 ‘ damn’ suis occasione detent’ debiti illius sibi
 ‘ adjudicari, &c.

Joinder.

‘ Et præd’ H. C. Ex quo ipse suffic’ mater’
 ‘ in lege ad manutenend’ exit’ infra content’
 ‘ pro parte ipsius H. Jur’ præd’ superius in Evi-
 ‘ dent’ ostens. quod ipse parat’ est verificare,
 ‘ quam quidem materiam præd’ J. non dedi-
 ‘ cit nec ad eam aliquammodo respond’ sed veri-
 ‘ ficationem illam admittere omnino recusat
 ‘ pet’ Judic’ & quod prædict’ J. ab actione sua
 ‘ præd’ versus eum habend’ præcludatur, ac
 ‘ quod Jur’ præd’ de Verdict’ suo super exit’
 ‘ præd’ reddend’ exonerentur, &c.

A Precedent of a Demurrer upon the Evidence.

And now at this Day the said Plaintiff and Defendant by their Attorneys did appear, and the Jury likewise did appear and were sworn, &c. upon which Sir T. W. Serjeant at Law, of Counsel with the Plaintiff, gave in Evidence so and so, and repeat it truly, and did require the Jurors to find for the Plaintiff, upon which J. C. of Counsel with the Defendant saith, That the Evidence and Allegations aforesaid alledged, were not sufficient in Law to maintain the Issue joined for the Plaintiff, to which the Defendant needed not, nor by the Laws of the Land is not holden to give any Answer; wherefore for Default of sufficient Evidence in this Behalf, the De-
 4 defendant

fendant demands Judgment, that the Jurors aforesaid of giving their Verdict be discharged, &c. and that the Plaintiff be barr'd from having a Verdict, &c. Then the Plaintiff joins and says, That he had given sufficient Matter in Evidence, to which the Defendant hath given no Answer, &c. and demands Judgment, and that the Jury be discharged, and that the Defendant be convicted; then the Jury may give Damages, if Judgment shall happen to be for the Plaintiff, &c.

A Bill of Exception.

Ebor. sc. Memorand. That the 1st Day of August, Anno 1650. before T. P. and W. Justices of our said Lord the King, for taking Affizes in the said County assigned, in a Plea of Trespass and Ejectment, which J. S. in the Court of our said Lord the King before himself, by Bill, doth prosecute against E. B. supposing by the said Bill, that the aforesaid T. B. &c. [*And recite the Substance of the Declaration, or what it is, &c. and the Issue, and then what the Evidence to prove the Defendant guilty was,*] Which here was a Surrender of a Copyhold out of Court, &c. and that he desired the Jury aforesaid to give their Verdict for the said T. B. of and upon the Premises, and that he likewise desired the Judges aforesaid, that they would inform the Jury aforesaid, that the Surrender aforesaid out of Court made, was good and effectual in Law, and the aforesaid Justices, the aforesaid Surrender of the Land aforesaid, with the Appurtenances, made out of Court, of the Manor aforesaid, in Form aforesaid, did affirm to the said Jurors was not good in Law, by which the said Thomas for that the

N

afore-

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aforesaid Matters to the said Jurors in Evidence shewed. doth not appear, &c. did request of the said Justices, according to the Form of the Statute in such Case provided, this present Bill, which doth contain in it the Matter aforesaid, above by him to the Jurors aforesaid shewed, by which the said Justices, at the Request of the said *Thomas*, this Bill have sealed at D. aforesaid.

Vide a Bill of Exceptions in the *King's Bench*, upon a Trial at the Assizes in *Sam. Vernon's Case*, in *Brownlow's Entries Latin Rediviv.* f. 129. Where the Declaration, Plea, and Continuances are set forth, and then the Exceptions. A very useful Precedent.

' De Termino Sancti Hillarii, Anno Regni
' Domini *Caroli* secundi, nunc Regis Angliæ,
' &c. 33 & 34.

' Billa ff. *Samuel Verdon* Gen. un' Clerc', &c.
' [Here recite all the Pleadings and Continuances of
' the Record] Qui quidem separal' exit' in for-
' ma præd' inter partes præd' respective junct'
' postea scilicet ad Assizas tent' apud Castr'
' Cant' in Com' præd' coram *W. Mountagne*
' Capitali Baron' Scaccarii dicti Dom' Regis
' & *H. Windham*, Mil' un' Justic' dicti Dom'
' Regis de Banco Justic' Dom' Regis ad Af-
' fisas præd' pro Com' capiend' assign' secun-
' dum formam Statut', &c. die Martis 14 die
' Martii Ann' Regni dict' Dom' Regis nunc 34.
' ad triation' deven' Ad quem diem coram
' Justic' præd' ven' tam præd' *Sam. Verdon* in
' propria persona sua quam præd' *I. F.* per At-
' torn' suum præd' & Jur' Jurat' ill' impanellat'
' exact' similiter ven' & in Jur' ill' separal'
' exit' præd' in forma præd' respective junct'
' jurat' fuer.

' Et super triatione ill' in forma præd' ha-
' bit'

bit' in manutentione præd' exit' superius tilt'
 junct' præd' S. V. dedit in evident' Jur' sic
 impanellat' & Jurat' Quod, &c. [*Here recite
 what he gave in Evidence.*] Ac super inde
 Consilarii ex parte præd' J. F. interposuer'
 & insistebant quod materia præd' Jur' præd'
 in Evidenc' sic ut præfertur dat' non fuit
 sufficiens in Lege ad manutenend' exit' præd'
 ex parte præd' S. V. Et ea de causa petier' &
 præfat' Judice quod materia illa foret sepe-
 ralit' compl' Nihilominus Justic' prædict'
 declaraver' opinion' suam quod materia præ-
 dict' Jur' præd' sic ut præfertur in Evidenc'
 dat' fuit sufficien' in Lege ad manutenend'
 exit' præd' ex parte præd' S. V. si Jur' ill' cre-
 derent & invenirent quod, &c. Ac super inde
 præfat' Justic' per directiones suas secund'
 opinion' suam præd' posuer' consideration'
 inde de Jur' præd' super quo consilarii præ-
 fat' I. F. conceper' quod per legem terræ
 materiæ præd' ex parte præfat' S. V. Jur' præd'
 in Evidenc' sic ut præfertur dat' (licet Jur'
 ill' crederent & invenirent quod, &c.) non
 fuer' in lege sufficien' ad manutenend' exit' ill'
 per præd' S. V. Ideo posuer' exception' suam
 opinion' Justic' præd' & petierunt quod præ-
 fat' Justic' apponer' man' sigill' sua huic billæ
 secundum formam Statuti in hujusmodi casu
 edit' & provis. ac superinde præfat' H Wind-
 ham apposuit manus & sigilla sua adinde se-
 cundum formam Statuti præd'. Dat' apud Ca-
 strum Cant' 14 die Martii Anno Regni dict'
 Dom' Regis nunc 35. H. Windham.

1. West. 2. 31. 13 E. 1. 1. When the Justices
 will not allow a Bill of Exception upon
 Prayer, if the Party impleaded tender the
 same unto them in Writing, and requires their
 Seals thereunto, they or one of them shall do it.

2. If the Exception sealed be not put into the Roll, upon Complaint thereof to the King, the Justice shall be sent for, and if he cannot deny the Seal, the Court shall proceed to Judgment according to the Exception.

This Bill of Exception is given by the Statute of *Westm. 2. cap. 31.* before which Statute a Man might have had a Writ of Error; for Error in Law, either *in redditione Judicii, in redditione Executionis* or *in Processu, &c.* which Error in Law must be apparent in the Record; or for Error in *fact*, by alledging Matter out of the Record, as the Death of either Party, &c. before Judgment. But the Mischief was if either Party did offer any Exception, praying the Justices to allow it, and the Justices over-ruling it, so as it was never entred of Record, this the Party could not assign for Error, because it neither appeared within the Record, nor was any Error in *fact*, but in Law; and so the Party grieved was without Remedy until this Statute was.

This Act extendeth to all Courts, to all Actions, and to both Parties, and to those who come in their Places, as to the Vouchee, &c. who comes *in loco tenentis*.

It extendeth not only to all Pleas dilatory and peremptory, &c, to Prayers to be received, Oyer of any Record or Deed, and the like; but also to all Challenges of Jurors, and any material Evidence given to any Jury, which by the Court is over-ruled, 2 *Inst. f. 427.*

All the Justices ought to seal the Bill of Exceptions, yet if one doth it, it is sufficient; if all refuse, it is a Contempt in them all. And the Party grieved may have a Writ grounded upon this Statute, commanding them
to

to put their Seals, *juxta formam Statuti, & hoc sub periculo quod incumbit nullatenus omittatis.*

The Party must pray the Justices to put their Seals; but if they deny it they may be commanded, and may do it after Judgment.

If the Party be dead, his Heirs or Executors, &c. according to the Case, may have a Writ of Error upon this Bill of Exceptions. And no Diminution can be alledged, for the Parties are confined to the Matter in the Bill.

If the Justice die before he acknowledgeth his Seal according to the Act, a *Scire facias* shall go to his Executor or Administrator, for the Death of the Judge is the Act of God, which shall not prejudice the Party: As in the Case of a Certificate of the Marshal of the King's Host, that the Person outlawed was in the King's Service beyond Sea, in a Writ of Error a *Scire facias* shall go to the Marshal's Executor or Administrator upon shewing the Certificate.

If the Judge denieth his Seal, the Party may prove it by Witnesses, *ib.*

Error of a Judgment at the Grand-Sessions in the County of *Pembroke*, in an Affize of *darrein Presentment*, by *Henry Cort*, against the Bishop of *St. David's*, *Dorothy Owen* and others, for the Church of *Stackpool*.

The fourth Error assigned was, because the Issue being, whether *H. Cort* did last present one *R. D.* the last Incumbent, who was instituted and inducted upon this Presentation: The Plaintiff offered in Evidence Letters of Institution, which appeared to be, and so mentions that they were sealed with the Seal of the Bishop of *London*, because the Bishop of *St. David's* had not his Seal of Office

there, and those Letters were made out of the Diocess; and the Defendant had demurred thereupon, that those Letters were insufficient, and the Demurrer was denied, which *Jones* said was an Error, because they ought to have permitted the Demurrer, and should have adjudged upon it. But it was held, That the not admitting of the Demurrer ought not to be assigned for Error; for when upon the Evidence, the Matter was over-ruled by the Justices of Assize, that was a proper Cause of a Bill of Exceptions, and the Remedy which the Statute appoints in that Case: And for the Matter of the Letters of Institution sealed with another Seal, and made out of the Diocess, it was held they were good enough, for the Seal is not material, it being an Act made of the Institution, and the Writing and Sealing is but a Testimonial thereof, which may be under any Seal, or in any Place. But of that Point they would advise, *Cro. 1 Part, 340.*

The Party grieved may have a Writ of Error, and may assign Error upon that Bill sealed, and also in the Record, or in one of them at his Pleasure, *F. N. B. f. 21. N. Ex rigore juris*, it need not be allowed in Arrest of Judgment, *27 H. 8. in Tatum's Action* upon the Case.

Note, This Bill is to prevent the Precipitancy of the Judges, and ought to be allowed in all Courts, and in all Places of Pleadings, and may be put in at any Time before the Jury have given their Verdict.

But this Bill is rarely used, there being *impar congressus* betwixt the Judge and the Counsel; and the Prudence of the Judges induce them

them to find special Verdicts in Cases of Doubt and Difficulty.

A Release prayed at the Assizes after Issue joined.

‘ Et præd’ Defend’ in propria persona sua
 ‘ ven’ & dic’ quod præd’ Justic’ Dom’ Regis hic
 ‘ ad caption’ Jur’ prædict’ inter ipsum Defend’
 ‘ & præfat’ Quer’ procedere non debent quia
 ‘ dic’ quod post xii diem F. ult’ præterit’ de quo
 ‘ die Jur’ præd’ inter partes præd’ continuat’
 ‘ fuit, & ante hunc diem [scilicet diem de Assise]
 ‘ scilicet primo die M. Anno, &c. apud, &c.
 ‘ præd’ Quer’ per nomen, &c. remisit, relaxa-
 ‘ vit, &c. Et hoc, &c. unde pet’ quod Justic’
 ‘ præd’ ad captionem Jur’ præd’ ulterius pro-
 ‘ cedere volunt.

The Death of one of the Defendants pleaded after the last Continuance.

‘ Et prædict’ Defendens per A. B. Attorna-
 ‘ tum suum ven’ & præd’ T. non ven’ & super
 ‘ hoc prædict’ Defend’ dic’ quod post ult’ con-
 ‘ tinuationem placiti præd’ scilicet post xv
 ‘ Paschæ ult’ præterit’ de quo die loquela præ-
 ‘ dict’ ult’ continuat’ fuit hic usque ad diem
 ‘ scilicet in Crastino Sanctæ Trinitat’ tunc
 ‘ prox’ sequen’ & ante eundem diem scilicet
 ‘ decimo die Maii ult’ præterit’ prædict’ T.
 ‘ apud A. prædict’ obiit. Et pet’ quod null’
 ‘ process’ nec aliquid aliud in placito prædict’
 ‘ ulterius versus præfat’ T. fiat & quia præd’
 ‘ I. & K. hoc non dedic’ Ideo null’ process’
 ‘ nec aliquid aliud in placito præd’ versus præ-
 ‘ fat’ T. fiat, &c.

*A Baron challengeth the Panel because no Knight
was returned of the same.*

‘ Et super hoc idem T. calumpniat arraia-
‘ ment panelli prædict’ quia dic’ quod ipse est
‘ & tempore arraia-ment’ panelli illius fuit
‘ Baro hujus Regni Angliæ locum & vocem
‘ habens in quol’ Parlamento hujus Regni
‘ quodque in eodem panello nullus Miles no-
‘ minat’ & retorn’ existit Et hoc paratus est ve-
‘ rificare unde petit Judiciam & quod panel-
‘ lum illud cassetur, &c.

C H A P.

C H A P. X.

Of what Things a Jury may inquire; when of Spiritual; when of Things done in another County, or in another Kingdom; when of Estoppels, and when not; when of a Man's Intent, &c.

TH E next Words in the Writ, which See more of these, *per quos rei veritas melius sciri poterit; cap. 13.* have not yet been taken Notice of, are this Matter, and this is the chief End of their meeting together: No Court can give a right Judgment, unless the Truth of the Fact be certainly known; and to find out this Truth, no Way is like to this of Juries: For they do not only go upon their own Knowledge, though they are Neighbours to the Place where the Question is moved, and so are presumed to have a better Knowledge of the Fact, than any others; for *vicinus facta vicini præsumitur scire*; But lest this Presumption should fail, the Law allows other Evidence to be given to them, by which they may more certainly and confidently give their Verdict of the Issue, which is meant by this Word *Rei*. *Ex facto Jus oritur.*

And here it will not be amiss to give you a brief Description, *de quibus rebus*, what the Inquest may inquire of, and find.

Wherefore, though it be true, that a Jury *Of the Law.* shall not be charged, or meddle with a Matter of Law; and if they do, and find it, their Verdict as to this shall be void; yet daily Experience

Experience (as well as *Littleton*, Sect. 368) tells us, that they may take upon them the Knowledge of the Law, and give a general Verdict; though to find the Special Matter is the safest Way for them; because, if they mistake the Law, they run into the Danger of an Attaint.

In the Case of *Manby* and *Scot*, adjudged *Trin. 13 Car. 2. B. R.* one Question was, If the Verdict was well found, in an Action of the Case against the Husband for Wares bought by the Wife; the Verdict finding, that the Wares were Necessaries, and according to her Degree, whereas (as was objected) they ought to have found the Degree of the Party, and the Value of the Wares, and left it to the Court to judge?

But it was answered and resolved, that the Court, *i. e.* the Judge before whom 'tis tried, informs the Jury of the Matter of Law, and accordingly they find, and so it belongs not to this Court.

Broughton, a Reader of the *Temple*, brought a Bill by *Quo minus* in the *Exchequer*, against *Prince*, for maintaining a Suit against the Statute, &c. *Prince* pleads, that he was admitted in the *Inner-Temple*, and Student for many Years there, that he was *Consiliarius*, in *Lege eruditus*, and took his Fee in that Cause. *B.* replied, *de Injuria sua propria absque hoc quod in lege eruditus, &c. & hoc petit, &c. & defendens similiter.*

It was moved, That the Defendant should demur to the Replication. *Atkinson* excepted to the Traverse and Conclusion; for it cannot be tried by a Jury; for (says he) if Matters in Law be to be tried by the Judges, *à fortiori*, the Learning of the Law ought to be tried by them.

Per

Per Manwood Chief Baron, It shall be tried by the Country, 3 *Leo.* 237. *Broughton* versus *Prince*; which Case is cited, 3 *Cro.* 728. to be otherwise ruled; yet it was allowed there a good Issue, whether a Parson of a Parish could speak *Welsh*.

Hut. 20, 21. Whether a Complaint was levied according to the Custom, was tried by a Jury who are directed by the Court, as to the Complaint, and whether it were pursuant to the Custom, and are to find according to such Directions.

In many Cases, the Jury are to inquire of the Knowledge and Intent of a Man, as where the *Nar.* is, that the Defendant kept a Dog which killed the Plaintiff's Sheep, *sciens canem suum ad mordendos oves consuetum*; though *sciens* be not traversable, yet the Jury upon Evidence must enquire of it, *Lib.* 4. 18.

In some Cases, a Jury may try and find a spiritual Thing, as a Divorce, Matrimony, &c. and must take Notice thereof, upon Pain of Attaint, *lib.* 4. 29. *lib.* 9. *lib.* 7. 43. *Vide hic*, *cap.* 2.

The Jury may find Bastardy, but it was Bastard. pleaded it must be tried by Certificate.

So they may find a Divorce, for it is not Divorce. Matter of Record, but a Matter in *Fait*.

The Jurors of one County may find any transitory Thing done in another County: Nay sometimes they must find local Things in another County; as if the Heir pleads *riens per descent*, and

In Trespass *Quare clausum fregit* in the County of *D.* where the Trespass was committed in the County of *S.* upon Not guilty, if the Jury find the Defendant Guilty in the County of *S.* their Verdict is void. But if they find him Guilty generally, an Attaint lieth, *Finch* 400. because this Trespass is local; and what is local cannot be inquired of by Men of another County, for they can have no Consens of it.

the

Of Things
done in ano-
ther County
or Country.
Vide cap. 8.

Roll. tit. Trial,
fol. 571, 624.

the Plaintiff replies, Assets in a Parish and Ward within *London*, the Jury may find Assets in any County; the same Case against an Executor, who pleads *plene administravit*; the Jury may likewise find Assets in any Part of the World. And the Reason is, because the Place is only named for Necessity of Trial. But where the Place is Part of the Issue, it is otherwise. And therefore, if I promise in one Place to do a Thing in another, and Issue is upon the Breach, the Jury ought to come from the Place of the Breach. But if I promise in *London*, to do a Thing at *Bordeaux* in *France*, and Issue upon the Breach, yet this shall be tried in *London* for Necessity, because otherwise it would want Trial, the Jury must enquire of the Breach at *Bordeaux*. But if I promise in *France* to do a Thing in *France*, so that both Contract and Performance is beyond Sea, this wants Trial in our Law, *Lib. 6. 47. Lib. 7. 23, 26, 27.*

In the Case of *Drake and Beere, Trin. 15 Car. 2. B. R.* this Difference was agreed by the Court, *viz.* That a Jury in an inferior Court may inquire of Things out of the Jurisdiction, if they be but for Increase of Damages, as is *1 Cro. 571. Ireland versus Blackwel*; but if they inquire of any Thing issuable out of that Jurisdiction, it is naught, *1 Cro. 101. 2 Cro. 503.*

Jurisdiction
of Courts.

Error was brought to reverse a Judgment given in the Palace-Court, in *Indebitat.* for that the Defendant was indebted to the Plaintiff *infra Jurisdictionem*, for Nursing of a Child, not saving, the Nursing was *infra Jurisdictionem.*

Wadl. Windham Justice, held it good, for that it is a Debt every where, and not like a Debt that ariseth by Matter collateral: But
Twis-

Twisden Justice doubted, *Whitehead* vers. *Brown*.
Pasch. 15 Car. 2. B. R.

Vide Saunders's Reports, 1 Part, 73. *Peacock* against *Bell* and *Kendal*. The Plaintiff declared the Defendant *infra Jurisdictionem indebitatus fuisset* to the Plaintiff in 39 l. *pro diversis Merchandizis per quer. eidem Defendenti ante tempus illud vendit. & deliberat.* Held naught in an inferior Court, for not saying *ibidem vendit. &c.* but good in a superior Court, and in the County-Palatine of *Durham*, for that is an original and superior Court. Inferior Courts.

The Jury may find Estoppels, as the taking of a Lease of a Man's own Land, by Deed indented, or the Delivery of a Deed before the Date, as in Debt by an Administrator, upon a Bond dated 4 Aprilis, 24 Eliz. The Defendant pleaded that the Intestate died before the Date of the Obligation, and *issint nisnt son fait*, upon which they were at Issue, and adjudged that the Jury might find that the Bond was delivered the third of April, because they are sworn *ad veritatem dicendam*; though the Parties are estopped to plead a Deed, was delivered before the Date; but they may plead a Delivery after the Date, because it shall never be intended that a Deed was delivered before the Date, but after it may. When the Estoppel is found, the Court may judge according to the especial Matter

But if the Estoppel or Admittance be within the same Record, in which Issue is joined, then the Jurors cannot find any Thing contrary to this, which the Parties have affirmed and admitted of Record, though it be not true, for the Court may give Judgment upon Matters confessed by the Parties; and the Jurors are not to be charged with any such Thing, but only with such in which the Parties vary, *Lib. 2. 4. Lib. 4. 53. Co. Lit. 227.* Estoppels.

Decree.

A Decree in *Chancery* shall be tried by a Jury, and not by it self; for it is not a Record, but a Decree recorded. The *Chancery*, as it is a Court of Equity, is not a Court of Record, but touching Things agitated in the *Petty-Bag Office*, it is a Court of Record.

Exemplification.

Exemplification of a Decree in *Chancery*, which has Bill and Answer, allowed good Evidence, *Keb. 1 Part, 21. Deeds, &c.*

Records not shewed.

The Jury may find Deeds or Matter of Record, if they will, though not shewed in Evidence, *Finch 400.* They may inquire of Things done before the Memory of Man, *Lib. 9. 34.*

Foreign County.

The Jury in many Cases may find Matters in a foreign County, Conditions, Records, Releases, &c. As in Battery of the Plaintiff's Servant in one County, and Loss of Service in another County, this Damage in the other County may be inquired of by the Jury of the County where the Battery is laid. The like of Affets, because transitory; otherwise of a local Trespas, &c.

Nul tiel Record is not to be tried by a Jury, but upon the general Issue, &c. they may find a Record.

Warranty.

The Jury may find a Warranty, being given in Evidence, though it be not pleaded: Nay, the Jury may find that which cannot be pleaded; as in Trespas, upon Not guilty, the Jury may find that the Defendant leased Lands for Life, upon Condition, and entred for the Condition broken; though this cannot be pleaded without Deed, yet the Jury may find it, *Lit. Sect. 366.*

Condition.

Where a collateral Warranty binds, this may well be given in Evidence; for although it doth

doth not give a Right, yet in Law this shall bar and bind a Right, *Lib. 10, 97.*

Where the Plaintiff's Title is by Estoppel, and the Defendant pleads the general Issue, the Jury are bound by the Estoppel; for here is a Title in the Plaintiff, that is a good Title in Law, and a good Title if the Matter had been disclosed and relied on in Pleading; but if the Defendant pleads the special Matter, and the Plaintiff will not rely on the Estoppel when he may, but take Issue on the Fact, the Jury shall not be bound by the Estoppel; for then they are to find the Truth of the Fact which is against him. Thus in Debt for Rent on an Indenture of Lease, if the Defendant plead *Nil debet*, he cannot give in Evidence, That the Plaintiff had nothing in the Tenements; because, if he had pleaded that Specially, the Plaintiff might have replied the Indenture and estopped him; but if the Defendant plead *Nil habuit*, &c. and the Plaintiff will not rely on the Estoppel, but reply *habuit*, &c. he waives the Estoppel, and leaves it at large; and the Jury shall find the Truth notwithstanding his Indenture, *Salkeld* 276, 277.

Jury is bound by Estoppel unless the Party leaves the Fact at large by Pleading.

C H A P. XI.

The Juries Oath; why called Recognitors in an Assise, and Jurors in a Jury. Of the Trial per medietatem linguæ; when to be prayed, and when grantable. Of a Trial betwixt two Aliens, by all English. Of the Venire Facias, per medietatem linguæ, and of a Challenge to such Juries.

Assise, Enquest and Proof, are taken for the word Jury. Vide 28 E. 3. 13.

See Chap. I.

1 Inst. 154.

Assisa for Jurata.

THE Jury having heard their Evidence, let them now consider of their Verdict: But first they must remember their Oath, which in effect is, *To find according to their Evidence*, and therefore they should have had it before the Evidence, but that the Form and Order of the *Venire facias* (which I have tried my self to follow) leads me to it after their Evidence, in these Words, *Ad faciend. quendam Juratam*. I have already shewed the Derivation of this Word *Juratam*, and what is the legal Accepration of it; only observe with our great Master *Littleton*, That the word *Assise* is sometimes taken for a Jury; so, as the learned Commentator doth well paraphrase, that the word *Assise* is *Nomen Equivocum Equivocans*, because sometimes it signifieth a Jury, sometime the Writ of Assise, and sometime an Ordinance or Statue; but *Juratam* is *Nomen Equivocum Equivocatum*, because we always understand that Word (according to the afore-said Definition) to be a Jury of twelve Men, so called, by reason of the Oath they take,

2

Truly

Truly to try the Suit of Nisi prius, between Party and Party, according to their Evidence.

The Juries Oath.

And as in an Assise, the Jurors are called Recognitors, from these Words in the Writ of Assise, *facere Recognitionem*; so upon a Nisi prius, they are called *Juratores*, from these Words in the *Venire facias*, *Ad faciend' quandam Juratam*.

Why called Recognitors in an Assise, and Jurors in a Jury.

In ancient Time, the Jury, as well in Common Pleas, as in Pleas of the Crown, were twelve Knights, as appears by *Glanvil, Lib. 2. cap. 14.* and *Bracton, fol. 116.*

12 Knights.

The next Words of the *Venire facias* are, *Inter partes prædictas*. In the fourth Chapter, I have instanced, That in some Cases, a Jury shall be awarded betwixt the Party and a Stranger to the Writ and Issue; I will now shew what the Jury shall be, when one of the Parties is an Alien, the other a Denizen; and when both Parties to the Issues are Aliens.

This Trial is called in Latin, *Triatio bilinguis*, or *per medietatem linguæ*. And this Trial by the Common Law was wont to be obtained of the King, by his Grant made to any Company of Strangers, as to the Company of *Lumbards* or *Almaignes*, or to any other Company, that when any of them was impleaded, the Moiety of the Inquest should be of their own Tongue, *Staundf. Pleas of the Crown, Lib. 3. cap. 7.*

Jury per medietatem linguæ.

2 Keb. 315.

And this Trial in some Cases, *per medietatem linguæ*, was before the Conquest, as appears by *Lamb. fol. 91. 3. Viri duodeni Jure consulti, Angliæ sex, Walliæ totidem, Anglis & Wallis jus dicanto*. And of ancient Time, it was called *Duodecimvirale judicium*, *1 Inst. 155.*

Its Antiquity.

O

But

But afterwards this Law became universal: First by the Statute of 27 Ed. 3. c. 8. it was enacted, That in Pleas before the Mayor of the Staple, if both Parties were Strangers, the Trial should be by Strangers. But if one Party was a Stranger, and the other a Denizen, then the Trial should be *per medietatem linguæ*. But this Statute extended but to a narrow Compass, to wit, only where both Parties were Merchants or Ministers of the Staple, and in Pleas before the Mayor of the Staple: But afterwards, in the twenty-eighth Year of the same King's Reign, cap. 13. it was enacted,

‘ That in all manner of Enquests and Proofs,
 ‘ which be to be taken or made amongst A-
 ‘ liens and Denizens, be they Merchants or
 ‘ other, as well before the Mayor of the Sta-
 ‘ ple, as before any other Justices or Mini-
 ‘ sters, although the King be Party; the one
 ‘ half of the Enquest or Proof shall be Deni-
 ‘ zens, and the other half Aliens, if so many
 ‘ Aliens and Foreigners be in the Town or
 ‘ Place, where such Enquest or Proof is to be
 ‘ taken, that be not Parties, nor with the
 ‘ Parties in Contracts, Pleas, or other Quar-
 ‘ rels, whereof such Enquest or Proof ought
 ‘ to be taken: And if there be not so many
 ‘ Aliens, then shall there be put in such En-
 ‘ quests or Proofs, as many Aliens, as shall be
 ‘ found in the same Towns or Places, which
 ‘ be not thereto Parties, nor with the Parties,
 ‘ as aforesaid is said, and the Remnant of De-
 ‘ nizens which be good Men, and not suspi-
 ‘ cious to the one Party nor to the other.

So

So that this is the Statute which makes the King. Law universal, concerning the *medietatem linguæ*; for though the King be Party, yet the Alien may have his Trial. And it matters not, whether the Moiety of Aliens be of the same Country as the Alien, Party to the Action, is: For he may be a *Portugal* and they *Spaniards*, &c. because the Statute speaks generally of Aliens. See *Dyer* 144.

And the Form of the *Venire facias* in this *Venire facias*, Case is *De vicinet. &c. Quorum una medietas sit per medietatem de Indigenis, & altera medietas sit de Alienigenis* *linguæ.* *natis, &c.* And the Sheriff ought to return twelve Aliens and twelve Denizens one by the other, with Addition, which of them are Aliens, and so they are to be sworn. But if this Order be not observed, it is holpen as a Mis-return, by the Statute of 18 *Eliz. Cro. 3 Part, 818, 841.* So that *Brook* says, it is not proper to call it a Trial, *per medietatem linguæ*; because any Aliens of any Tongue may serve. But under his Favour I think it proper enough.

For People are distinguished by their Language, and *Medietas Linguæ* is as much as to say, half *English*, and half of another Tongue or Country whatsoever. Though it be not material of what Sufficiency the Jurors are, yet the Form of the *Venire facias* shall not be altered, but the Clause of *Quorum quilibet habeat, 4 l. &c.* shall be in, *Cro. 3 Part, 481.*

But suppose that both Parties be Aliens, of whom shall the Inquest be then? It is resolved, that the Inquest shall be all English; for though the English may be supposed to favour themselves more than Strangers, yet when both Parties are Aliens, it will be presumed they favour both alike, and so indiffe-

rent, 21 H. 6. 4. But if the Plea be before the Mayor of the Staple, and both Parties Alien Merchants of the Staple, it shall be tried by all Aliens. *Staundford's Pleas del Corone*, 159. A *Scotchman* is a Subject and shall not have this Trial. *Egyptians* are also excluded, when tried for Felony made by the Statute against them, 1 *Phil. & Mar. cap. 4.* 5 *Eliz. cap. 20.*

All English. Where an Alien is Party, yet if the Trial be by all English, it is not erroneous, because it is at his Peril, if he will slip his Time, and not make use of the Advantage which the Law giveth him when he should, *Dyer* 21.

When the Alien should pray a *Venire facias per medietatem*. The Alien ought to pray a *Venire facias per medietatem linguæ*, at the Time of the awarding the *Venire facias*: But if he doth it at any Time before a general *Venire facias* be returned and filed, the Court may grant him a *Venire facias de novo*. *Dyer* 144. 21 H. 7. 32. though it hath been questioned.

Tales. But if he hath a general *Venire facias*, he cannot pray a *Decem Tales*, &c. *per medietatem linguæ*, upon this; because the *Tales* ought to pursue the *Venire facias*, 3 E. 4. 11, 12. And so if the *Venire facias* be *per medietatem linguæ*, the *Tales* ought to be *per medietatem linguæ*; as if six Denizens and five Aliens appear of the principal Jury, the Plaintiff may have a *Tales, per medietatem linguæ*, *Lib.* 10. 104. But if in this Case the *Tales* be general, *de circumstantiis*, it hath been held good enough; for there being no Exception taken by the Defendant, upon the Awarding thereof, it shall be intended well awarded, *Cro.* 3 Part, 818, 841.

If the Plaintiff or Defendant be Executor or Administrator, &c. though he be an Alien, yet

yet the Trial shall be by English, because he sueth in *auter droit*; but if it be averred that the Testator or Intestate was an Alien, then it shall be *per medietatem linguæ*, Cro. 3 Part, English.

275.

Mich. 40 and 41 Eliz. The Queen's Attorney exhibited an Information against *Barre* and divers other Merchants, some whereof were English, and some Aliens: After Issue, the Aliens prayed a Trial *per medietatem linguæ*. But all the Justices of *England* resolved, That the Trial should be by all English, and likened it to the Case of Privilege, where one of the Defendants demands Privilege, and the Court, as to his Companion, cannot hold Plea, there he shall be ousted of his Privilege, *sic hic*: *Moor 557.*

By the Statute of 8 H. 6. cap. 29. Insufficiency or Want of Freehold is no Cause of Challenge to Aliens, who are impanelled with the English, (notwithstanding *Staundford's* Opinion, *Pl. Coron.* 160.) for this Statute saith, That the Statute 2 H. 5. 3. shall extend only to Enquests betwixt Denizen and Denizen.

If the Defendant do not inform the Court that he is an Alien upon awarding the *Venire facias*, and so pray a *Venire facias per medietatem linguæ*; he cannot challenge the Array for this Cause at the Trial, if the Jury be all Denizens; (notwithstanding *Staundford's* Opinion to the contrary, and the Books cited by him, *fol. 159. Pl. Cor.*) For the Alien at his Peril should pray a *Venire facias per medietatem linguæ*, *Dyer 357. Vide Roll. tit. Trial, 643.*

If the Plaintiff be an Alien, he must suggest it before the Awarding of the *Venire facias*; but if the Defendant be an Alien, the

Plaintiff is allowed to surmise that, before or after the *Venire facias*, because the Defendant's Quality may not be known to him before, 27 H. 7. 32.

If the Defendant be an Alien, on Notice given by his Attorney, to the Plaintiff or his Attorney, the Plaintiff ought to enter it on the Roll, to have a Trial *de medietate* at his Peril; but the Court refused to award it for the Defendant, on his *Affidavit* that he is an Alien, *Keble*, 1 Part, 547.

C H A P. XII.

How the Jury ought to demean themselves, whilst they consider of their Verdict; when they may eat and drink, when not; what Misdemeanor of theirs will make the Verdict void: Evidence given them, when they are gone from the Bar, spoils their Verdict: For what the Court may fine them, and where the Justices may carry them in Carts, till they agree of their Verdict. An Amercement affeered by the Jury.

THere is a Maxim, and an old Custom ^{Jurors ought} in the Law, That the Jury shall not eat ^{not to eat or} nor drink after they be sworn, till they have ^{drink.} given their Verdict, without the Assent and Licence of the Justices; and that is ordained by the Law for eschewing of divers Inconveniences that might follow thereupon; and that especially if they should eat or drink at the Costs of the Parties; and therefore if they do so, it may be laid in Arrest of Judgment. ✎

But with the Assent of the Justices they may both eat and drink; as if any of the Jurors fall sick before they be agreed of their Verdict, so soon that he may not commune of the Verdict, then by the Assent of the Justices he may have Meat or Drink, and also such other Things as be necessary for him, and his Fellows also at their own Costs, or at the ^{For by Assent} indifferent Costs of the Parties, if they so ^{of the Parties,} agree, or by the Assent of the Justices, may ^{they may eat} both ^{and drink.}

Br. Jurors.

both eat or drink: And if the Case so happen, that the Jury can in no wise agree in their Verdict; as if one of the Jurors knoweth in his own Conscience the Thing to be false, which the other Jurors affirm to be true, and so he will not agree with them in giving a false Verdict, and this appeareth to the Justices by Examination, the Justices may in such Case suffer the Jury to have both Meat and Drink for a Time, to see whether they will agree. And if they will in no wise agree, the Justices may take such Order in the Matter as shall seem to them by their Discretion to stand with Reason and Conscience, by awarding of a new Inquest, and by setting Fine upon them, that they shall find in Default, or otherwise, as they shall think best by their Discretion; like as they may do if one of the Jury die before the Verdict, &c. *Doct. and Student*, 158.

New Inquest
when the Jury
cannot agree.

Where, if the
Jury eat or
drink, it shall
avoid the
Verdict, and
where only
fineable.

If the Jury after their Evidence given unto them at the Bar, do at their own Charges eat or drink, either before or after they be agreed on their Verdict, it is fineable, but it shall not avoid the Verdict; but if before they be agreed on their Verdict, they eat or drink at the Charge of the Plaintiff, if the Verdict be given for him, it shall avoid the Verdict, but if it be given for the Defendant, it shall not avoid it; & *sic è converso*. But if after they be agreed on their Verdict, they eat or drink at the Charge of him for whom they do pass, it shall not avoid the Verdict, 1 *Inst.* 228.

To give the Jury Money, makes their Verdict void; by two Justices, *Leon.* 1 Part, 18.

If the Plaintiff after Evidence given, and the Jury departed from the Bar, or any for him, do deliver any Letter from the Plaintiff to any of the Jury, concerning the Matter in Issue, or any Evidence, or any Escrow touching the Matter in Issue, which was not given in Evidence, it shall avoid the Verdict, if it be found for the Plaintiff; but not, if it be found for the Defendant; & *sic è converso*. But if the Jury carry away any Writing unsealed, which was given in Evidence in open Court, this shall not avoid their Verdict, albeit they should not have carried it with them, *Ibid*

What delivered to the Jury after Evidence, shall avoid their Verdict. *Littleton's Rep. 69. Keble, 1 Part, 824.*



By the Law of England, a Jury, after their Evidence given upon the Issue, ought to be kept together in some convenient Place, without Meat or Drink, Fire or Candle, (which some Books call an Imprisonment) and without Speech with any, unless it be the Bailiff, and with him only, if they be agreed. After they be agreed, they may in Causes between Party and Party, give a Verdict, and if the Court be risen, give a privy Verdict before any of the Judges of the Court, and then they may eat and drink, and the next Morning in open Court, they may either affirm, or alter their privy Verdict, and that which is given in Court shall stand. But in criminal Cases of Life or Member, the Jury can give no privy Verdict, but they must give it openly in Court.

How the Jury ought to be kept by the Bailiff.

When they may eat and drink. See *Smith's Common-wealth, 74.*

Where there can be no privy Verdict.

A privy Verdict may be taken in a *Quo Warranto*, Perjury, or where-ever the King is Party, unless in Case of Life and Death, *Keble, 3 Part, 459.*

Neither

Where the
Jury cannot
be discharged
before Ver-
dict.

The King
cannot be
Nonsuit.

Neither can a Jury sworn and charged in Case of Life or Member, be discharged by the Court, or any other, but they ought to give a Verdict. And the King cannot be Nonsuit, for he is in Judgment of Law ever present in Court; but a common Person may be Nonsuit. And in civil Actions the Justices upon Cause may discharge the Jury. *Br. Inquest.* 68. 47. 39, &c.

In an Information by an Informer, *qui tam*, &c. the Informer may be nonsuited, 1 *Inst.* 139. *Coke's Entries.* tit. *Information*, 394.

Information.

But this is against common Practice; and I have known, that after a Jury of Life and Death have been sworn, and charged with Prisoners arraigned, the Judge having been credibly informed, that it was a Jury pack'd to favour some Prisoner, has discharged that Jury, and made the Sheriff return another presently.

In *Hilary-Term*, *Sexto H. 8. Rotul.* 358. It was alledged in Arrest of the Verdict at the *Nisi prius*, That the Jurors had eat and drunk. And upon Examination it was found, that they had first agreed, and that returning to give their Verdict, they saw *Rede* Chief Justice in the Way, going to see a Fray, and they followed him, *Et in veniendo viderunt scyphum & inde biberunt.* And for this every one of them was fined 40 *d.* And the Plaintiff had Judgment upon the Verdict, *Dyer* 37.

Jurors fined.

Jurors at the
Nisi prius, fi-
ned in Bank,
for eating
Pears and
drinking Ale.

And *Dyer* 218. At the *Nisi prius*, the Jury after their Charge given, returned and said, That they were all agreed except one, who had eat a Pear, and drunk a Draught of Ale, for which he would not agree; and at the Request of the Plaintiff, the Jury was sent back again, and found the Issue for the Plaintiff.

tiff. And the Matter aforesaid being examined by the Oath of the Jurors *Separatim*, and the Bailiff who kept them, and found true, the Offender was committed, and afterwards found Surety for his Fine. *Si, &c.* And *Fitzherbert*, the then Justice of Assise, gave him Day *in Banco, &c.* At which Day a Fine of twenty Shillings was there assessed. *Et quoad Ball. Curia advisare vult.*

In Trespass by *Mounson* against *West*, the Jury was charged, and Evidence given, and the Jurors being retired into a House for to consider of their Evidence, they remained there a long Time without concluding any Thing, and the Officers of the Court who attended them, seeing their Delay, searched the Jurors, if they had any Thing about them to eat; upon which Search it was found, that some of them had Figs, and others Pippins, for which the next Day the Matter was moved to the Court, and the Jurors were examined upon Oath, and two of them did confess, that they had eaten Figs before they had agreed of their Verdict; and three other of them confessed, that they had Pippins, but did not eat of them, and that they did it without the Knowledge or Will of any of the Parties. And afterwards the Court set a Fine of 5*l.* upon each of them which had eaten, and upon the others which had not eaten, 40*s.* But upon great Advice and Consideration had, and Conference with the rest of the Judges, the Verdict was held to be good, notwithstanding the said Misdemeanor, *Leon. 1 Part, 133.*

Fined for having Figs and Pippins about them.

And see the Book of *Entries*, 251. The Jurors, after they went from the Bar, *ad seip-* Fined for eating Raisins and Dates.
50s of their Verdict to advise, *Comederunt quasi-*
dam

dam specias, scil. Raisons, Dates, &c. at their own Costs, as well before as after they were agreed of their Verdict. And the Jurors were committed to Prison, but their Verdict was good, although the Verdict was given against the King.

Fineable for having Sweet-meats, &c. about them, though they do not eat them. See *Pl. Com.* 519. One fined and imprisoned for having Sugar-candy and Liquorish about him.

Jurors carted.

The same Evidence given to the Jury, after they were gone from the Bar, by the same.

In *Ejectione firmæ*, it was found for the Defendant; three of the Jurors had Sweet-meats in their Pockets, and those three were for the Plaintiff, until they were searched and the Sweet-meats found, and then did agree with the other nine, and gave Verdict for the Defendant. It was the Opinion of the Justices, That whether they eat or not, they were fineable for having of the Sweet-meats with them, for that is a very great Misdemeanor. *Godbolt* 353.

40 *Affise Placito* 11. The Justices said, That if the Jurors will not agree in their Verdict, the Justices may carry them in a Cart along with them, till they are agreed.

The Jury were gone from the Bar to confer of their Verdict, and one of the Witnesses before sworn on the Defendant's Part, was called by the Jurors, and he recited again his Evidence to them, and after they gave their Verdict for the Defendant. And Complaint being made to the Judge of the Assises of this Misdemeanor, he examined the Inquest, who confessed all the Matter, and that the Evidence was the same in Effect that was given before, & *non alia nec diversa*. And this Matter being returned by the *Postea*, the Opinion of the Court was, That the Verdict was not good, and a *Venire facias de novo* was awarded, *Cro.* last Part, 189.

Trinity-Term, 1653. between *Wells* and *Taylor*. Copies of a Bill, Answer and Depositions were

were proved, but not all read and delivered to the Jury, who carried them with them from the Bar in a Bundle, which they laid by them and did not look on; yet their Verdict at the Bar was set aside for this Cause, and the Court would not regard their saying, that they did not read them, for they might say that to save themselves; it being a Fault to take any Thing without the Court's knowledge.

If the Names of the Jurors be transposed in the Panel of the *Habeas Corpus*, as those which were first in the Panel of the *Venire facias*, be set last in the *Habeas Corpus*, 'tis good Cause for a new Trial. So held in the *Exchequer*, 1694.

If the *Venire* be returned but not filed, the Panel may be changed; but by *Windham*, Not reasonable the Jury returned should be changed without Motion, *Keble*, 1 Vol. 562.

If one of the Parties say to the Jury after they are gone from the Bar, *You are weak Men*, *If a Party speak to them.* *it is as clear of my Side as the Nose in a Man's Face.* This is new Evidence, for his Affirmation may much perswade the Jury, and therefore shall quash the Verdict.

So if any of the Party's Servants speak to the Jury, and the Verdict goes for his Master, it may be quashed, but if for the other Side, 'tis only fineable, *Keble* 300, 1 Part.

So if any Thing be read to them, which they ought not to have with them, as a Book of Depositions, some whereof were read in Evidence. *Prat's Case*, 21 *Jac.*

The Plaintiff delivered an Escrowl to a Juror impanelled, before he was sworn, who afterwards being sworn, and gone with the Jury from the Bar, to consider of the Verdict, *Escrowl delivered to a Juror before he was sworn, vitiates the shewed Verdict.*

shewed the same Escrowl to his Companions, who found for the Plaintiff. The Minister who kept the Enquest, informed the Court hereof, and the Jury being examined, confessed the Matter aforesaid, upon which Judgment was stayed; for after the Jury are sworn, they ought not to see nor carry with them any other Evidence but what was delivered to them by the Court: Afterwards the Plaintiff said, That the Escrowl proved the same Evidence which was given to them at Bar by him; wherefore it was not so bad, as if it had been new Evidence not given before: *Sed non allocatur*, 11 H. 4. 17.

Church-Book
delivered to
the Jury, &c
of Court.

Pasch. 38 Eliz. Inter Vicary and Farthing, at the *Nisi prius*. The Issue was about Nonage, and two Church-Books were given in Evidence, one whereof was delivered to the Jury in Court, by the Assent of Parties, and afterwards the other was delivered to the Jury out of the Court, by the Solicitor of the Plaintiff, without the Assent of the Court, and a Verdict for the Plaintiff, and this was indorsed on the *Postea*; the Question was, Whether this should make the Verdict void, or no? For the Justices differed in Opinion, *Popham* and *Gawdy*, that it should not; *Fenner* and *Clench*, that it should; the Negative Justices gave these Reasons; That the Book was delivered in Evidence in the Court, and so the other Party might answer to it, and that the Court had informed the Jury of the Validity thereof, how far they were to believe it, with many other Reasons: But the Affirmative was urged, because there might be some Matter in this Book to induce them otherwise than was intended before, and because it was delivered

vered on his Part, for whom the Verdict passed, without the Court's Assent; yet one Book (*scil.* Cro. last Part, 411.) tells us, Judgment was afterwards given for the Plaintiff. See *Moor's Reports*, 452. The Books differ, for Cro. makes *Clench* give his Opinion for the Verdict. But *Moor* brings him on the other Side, which I conceive is truest; and for my Part, I know no reason why Foisting of Evidence to the Jury, without the Court, should have any Favour at all.

In the Case of *Taylor and Web. Trin. 1653.* *B. R. Twisden* moved to set aside a Verdict given at Bar, because that after Evidence, when the Writings were delivered to the Jury, some Writings which were not sealed (and therefore ought not to be delivered to the Jury) were delivered by a Stranger to the Jury.

Consider the
Reasons in
the former
Cases.

Hale, Counsel of the other Side, produces an *Affidavit* of the Foreman of the Jury, that they made no use of them in giving their Verdict, and that most of those Writings were read in Court, in Evidence upon the Trial; and *Hale* said, That if this should avoid the Verdict, then that would be in the Power of any Stranger unknown, and against the Mind of the Parties, to avoid any Verdict.

Rolle Chief Justice. The *Affidavit* of the Jury ought not to be allowed to make good their own Verdict, for now they are (as it were) Parties, and have offended, and shall not be allowed by their own Oath to take off their Offence; and it is the Duty of the Jury to look what Writings they receive before they go from the Bar; and if any such Paper be wrap'd up among other Papers delivered to them by the Court, so soon as they have

have discovered it, they should call in the Tipstaff who keeps them, and deliver it to him, and to testify they made no use of it; and he said it would be dangerous to give the least Way to the delivering of any Writings to a Jury.

And at another Day, *Rolle* cited 11 H. 4. 18. The Plaintiff (before the Trial) delivered a Breviate of his Evidence to the Jury, which contained no more than was proved in Court, yet by this the Verdict was avoided: So *Mich. 31 Eliz. C. B. Metcalf and Dean*. After the Jury were gone from the Bar, they sent for one of the Witnesses and re-examined him, who gave the very same Evidence that he had before given in Court, yet the Verdict was avoided; and the Reason of both is, a Fear and Jealousy that other Matters might be given, &c.

37 *Eliz. Farthing's Case*: A Paper not under Seal, which was given in Evidence, was delivered to the Jury, this did not avoid the Verdict, because here can be no such Fear; and by *Rolle*, If any Writing (though not given in Evidence) be delivered to the Jury by the Court, it shall not avoid the Verdict. And in the principal Case the Verdict was avoided.

Escrowl from
one who was
no Party.

Hill. 40 Eliz. Rot. 847. In Arrest of Judgment after Verdict, it was alledged, that a Juror delivered to his Companions, an Escrowl for Evidence to them, which was not given in Evidence at the Trial; and adjudged no Cause to arrest Judgment, unless it had been received from one of the Parties, which did not appear, *Moor 546*. but otherwise if it had been given by a Party, and the Jury had found for him.

In the Case of *Duke and Ventres*, Mich. 1656. B. R. tried at Bar, one Mr. *Bewerley* of *Suffolk* a Barrister was returned of the Jury, who (having been at a Trial of the same Cause above twenty Years before, in the *Exchequer*, and heard there great Evidence to make a Deed fraudulent, which was now the Contest) demanded of the Court, whether he ought to inform the rest of the Jury privately of this, or conceal it, or declare it in open Court? The Court ordered him to come into Court, and deliver all his Knowledge which he heard then proved (which Evidence was not now given, because the Parties were dead) and so he did, being not sworn again, but only upon the Oath taken as a Juryman.

And certainly it is of dangerous Consequence, to receive a Verdict against Evidence given, on Supposal that some of the Jury knew otherwise, or on private Information given by one Jury-man to the rest, where he can't be cross-examined; and let such Jurors beware of Attaint, but the best Way is (as before) in open Court.

In a Writ of Error, the first Error assigned Jury adjourned, That *Termino Trin.* twelve Jurors, and no journeymore, did appear. This *ex assensu partium* was adjourned until *Craftino Animar.* on which Day two others came in and were sworn, being of the first Panel.

The Court were all clear of Opinion, That this is no Error, this being good enough, they being all to be called again, *Leon. 3 Part, 38.*

If a Juror depart after he is sworn, he shall be fined and imprisoned, and by Assent of Parties, another Juror may be sworn, *Bro. Jurors 46. Lib. 5. 40.*

If a Man be nonsuited after the Jury is ready to give their Verdict, the Court may cause the Amercement of the Plaintiff to be presently assessed by the Jurors, *Lib. 8. 39.*

If a Jury give their Verdict by Lot, 'tis a Misdemeanour and Cause of a new Trial, although in *Prior and Powell's Case*, *Keble 1 Vol. 811.* a new Trial was denied, because the Lot seemed there very innocent.

But see *Keble's 3 Part, 805.* A Jury, on *Affidavit*, That they gave their Verdict on throwing Cross and Pile, were bound to appear to an Information; which 'tis said broke one of the Juror's Hearts, *Keble 1 Part, 811.*

The King against Mar-
chant, *Keble*
2 Part, 404,
405.

Upon a Motion for a new Trial on the Judges Certificate that the Verdict was against Evidence in Perjury. The Court said, there could be no new Trial for or against the King, and denied it, but said, the Certificate might mitigate the Fine.

Nota, The Court will not award new Trials on the Jurors Gain-saying their Verdicts, unless the Judge before whom it was tried, conceived the Verdict to be given against Evidence, *Per Cur. 13 Car. 2. B. 5.*

The Jury appearing and sworn in an Information of Extortion, the Court would not discharge the Jury upon a *Cessat Processus*, so the Attorney-General caused the Clerk of the Crown to enter a *Noli prosequi*.

Misdemeanour of a
Jury.

The Duke of *Richmond* versus *Wife*, *Pas. 23 Car. 2. B. R.* In an Ejectment the Parties had a Trial at Bar, and a Verdict for the Plaintiff. The Court was moved to set aside this Verdict, upon an *Affidavit* made of these Misdemeanours in the Jury, *viz.* That they had Bottles of Wine brought them before they had given their Verdict, which were put into

into a Bill together, with Wine and other Things, which were eat and drunk by the Servants of the Jury, and the Tipstaffs that attended them at the Tavern where they were consulting their Verdict. That this Bill (after the Verdict given) was paid by the Plaintiff's Solicitor; and that after they had given up their privy Verdict, they were treated at the Tavern by the Plaintiff's Solicitor before the Affirmance of it in Court.

Counsel being heard on both Sides as to those Matters, the Court delivered their Opinions *seriatim*, that the Verdict should stand. They said, they were not upon a discretionary setting aside of the Verdict, as when the Jury goes against Evidence: But whether these Miscarriages shall avoid it in Point of Law?

They all agreed, That if the Jury eat or drink at the Charge of the Party for whom they find the Verdict, it disannuls the Verdict; but here it doth not appear, That the Wine they drank was had by the Order of the Plaintiff, or any Agent for him: 'Tis true, in regard his Solicitor paid for it afterwards, it doth induce a Presumption that he bespoke it; but that again is extenuated by its being put into a Bill with other Things that were allowable; and if the Verdict should be quashed for this Cause, it must be entred upon the Roll, that it was for drinking at the Plaintiff's Charge, and it is not prov'd that this Wine was provided by him, And as to the other Part, That they received a Treat from the Plaintiff, after their privy Verdict given, and before it was given up in Court, that shall not avoid the Verdict.

Eating at the Party's Charge spoils the Verdict.

Being treated by the Plaintiff after a privy Verdict, does not spoil the Verdict.

Unless it induces them to change their Verdict.

But if the Defendant had treated them, and they had changed their Verdict, as they might have done in Court, it should then have been void, *Co. Lit.* 227. b. If after the Jury be agreed on their Verdict (which the Chief Justice said, must be intended such an Agreement as hath the Signature of the Court put upon it, *viz.* a privy Verdict,) they eat and drink at the Charge of him for whom they do pass it, it shall not avoid the Verdict; and if it should, the Court said, most Verdicts given at the Assizes would be void, for there 'tis usual for the Jury to receive a Collation after the privy Verdict given, from him for whom they find.

Speaking to the Jury by a Party concerned, where it avoids the Verdict.

Words of Salutation do not.

Papers given them after their Departure from the Bar, will avoid it.

But such Practice ought not to be, and if any of the Parties, their Attorneys or Solicitors speak any Thing to the Jury, before they are agreed relating to the Cause, (*viz.*) *That it is a clear Cause, or I hope you will find for such a one,* or the like, and they find accordingly, it shall avoid the Verdict; but if Words of Salutation, or the like, pass between them, (as was endeavoured to be prov'd) they shall not. Also if after they depart from the Bar, any Matter of Evidence be given them, as Depositions or the like, tho' the Jury swear they never looked on them, yet that shall quash their Verdict, But they all held in this Case, That though there was great Matter of Suspicion, yet there was not Matter of clear Proof (as there ought to be) sufficient to disannul this Verdict; but they said, it was a great Misdemeanour in the Jury for which they ought to be fined, and that the Plaintiff's Solicitor had carried himself with much Blame and Indiscretion; and

Ch. 12. *they consider of their Verdict.*

213

and the two TipstafFs which attended the Jury, for that they were not more careful, but conniv'd at these Matters were fined, the one forty Shillings (who appeared most in Fault) and the other twenty Shillings, 1 *Ventris* 124. TipstafFs fin'd for not keeping the Jury from Wine.

Anonymus, Mich. 21 Car. 2. B. R. One was committed for sending a Note to a Juryman, (after a privy Verdict given) to know what Verdict they gave, 1 *Ven.* 49. One committed for sending to know the Privy Verdict.

C H A P. XIII.

What Punishment the Law hath provided for Jurors offending ; as taking Reward to give their Verdict. Of Embraceors. Decies tantum. Attaint. Several Fines on Jurors. What Issues they forfeit, and of Judgment for striking a Juror in Westminster, &c.

YOU have already heard how the Court may fine the Jurors for their Misdemeanors in giving up their Verdict, I will proceed in shewing what Punishments they are liable unto, if they neglect their Duty ; and doubtless no Men have more need of knowing what Penalties the Law inflicts on their Offences, than common Jurors, who too often being pre-ingaged with Favour to the Plaintiff, or Malice against the Defendant, & *sic è converso*, or with common Interest (as they call it) where Tithes or Commons are in Question, will neither hearken to their Evidence, nor Direction of the Judge, but subvert the whole Drift of the Common Law, which will have them of the Neighbourhood where the Fact was committed, to the End that they knowing most of the Fact, may consequently give the best Verdict ; yet contrariwise, Jurors which live nearest, do now a-days most commonly so fetter themselves with Favour or Animosities to the Parties ; that those which live farthest off (as Juries from other Counties) for the most Part give the

the clearest Verdicts. And how should the Judges remedy this Mischief, but by severely punishing those Juries which offend? The Law in this will be their Guide, for without Doubt, (excepting Life and Member) the Law hath provided more severe Punishments against Juries, than against any other Offenders whatsoever, as well knowing that *corruptio optimi est pessima*: And common Jurors generally have nothing to do with this Verse, *Oderunt peccare boni, virtutis amore*; therefore 'tis fit they should be concerned in the next, *Oderunt peccare mali, formidine Pœnæ*; wherefore the Description of what this *Pœna* is, shall be the Subject of this Chapter.

If any Juror take a Reward to give his Verdict, and be thereof attainted, at the Suit of other than the Party, and maketh Fine, he which sueth shall have half the Fine; and if any of the Parties to the Plea bring his Action against such Juror, he shall recover his Damages. And the Juror so attainted shall have Imprisonment for one Year, which Imprisonment shall not be pardoned for any fine: This is by the Statute of 34 E. 3. cap. 8.

The Penalty of Jurors taking Rewards.

5 E. 3. cap. 10. it is accorded, That if any Juror in Assizes, Juries or Inquests, take of the one Party, or of the other, and be thereof duly attainted, that hereafter he shall not be put into any Assizes, Juries, or Inquests; and nevertheless he shall be commanded to Prison, and further ransomed at the King's Will. And the Justices before whom such Assizes, Juries and Inquests, shall pass, shall have Power to inquire and determine according to this Statute.

Shall not serve of any other Inquest.

Imprisoned and ransomed, (that is) fined.

A Man would think that these Statutes should have frightened any Juror from taking Rewards to give his Verdict. But,

— *Quid non mortalia pectora cogis
Auri sacra fames?*

So sacred is this love of Money, that Conscience her self must vail to it, and not stand in Competition with such Allurements: Wherefore the Law did redouble its Force; nay more, produced a *Decies tantum*, *scil.* That a Juror taking Reward to give his Verdict, shall pay ten Times as much as he hath taken; which Forfeiture, methinks, should make even those who love Money best, refuse to take Money upon such an Account, because it is like a Canker in their Estates, depriving them in the End, of ten Times more than it brought; for which hear the Statute 38 E. 3. cap. 12.

Decies tantum.

Embraceor.

Item, As to the Article of Jurors, in the 24th Year, it is assented and joined to the same, That if any Jurors in Assizes sworn, and other Inquests to be taken between the King and Party, or Party and Party, do any Thing take by them or other of the Party, Plaintiff or Defendant, to give their Verdict, and thereof be attainted by Process contained in the same Article, be it at the Suit of the Party that will sue for himself, or for the King, or any other Person, every of the said Jurors shall pay ten Times as much as he hath taken: And he that will sue shall have the one Half, and the King the other Half; and that all Embraceors, that bring or procure such Inquests in the Country, to take Gain or Profit, shall be punished in the same Manner and Form

Form as the Jurors. And if the Juror or Embraceor so attainted, have not whereof to make agree, in the Manner aforesaid, he shall have the Imprisonment of one Year. And the Intent of the King, of great Men, and of the Commons, is, That no Justice or other Minister, shall enquire of Office, upon any of the Points of this Article, but only at the Suit of the Party, or of other, as afore is said.

Upon which Statute there is a Writ called a *Decies tantum*; and who will may bring it, for it is a popular Action, and lies (as you see) where any of the Jurors, after he is sworn, taketh of one Party or of the other, or of both (and then he is called an *Ambi-* *Ambidexter* *dexter*) any Reward to give his Verdict, &c.

And it may be brought against all the Jurors and Embraceors, although they take several Sums of Money, and although the Jury give no Verdict, or a true Verdict. But it doth not lie against an Embraceor, if he taketh no Money, and imbraces, or taketh Money, and doth not imbrace. See *Bro. tit. Decies tantum* 13. and *F. N. B.* 171.

mentioneth nothing of his taking Money; and in my Opinion, the Case of 37 H. 6. 13. is full against him.

So *F. N. B.* faith, but for my Part, I think he is mistaken, for the Statute

An Embraceor is he that procures the Ju- Embraceor.

rors in the Country, to take Gain or Profit, or comes to the Bar with the Party, and speaks in the Matter, or stands there to survey the Jury, &c. or to put them in fear, or solicits them to find on the one Side or other, and this Fellow cloaks his Embracery, under Pretence of labouring the Jurors to appear, and to do their Conscience: And thus the At-

Attorneys ill Practice.

to

to do, and many Times put in a Word or two for their Clients ; which Practice deserves the most severe Punishment, next to their getting of the Sheriff to return such and such in the Jury, which they, having been Under-Sheriffs themselves, and so agree with one another, are most expert at.

But it was said by *Rolle* Chief Justice, That a Plaintiff might well intreat one Juror to appear, and that it was allowed in the Star-Chamber, but a Stranger could not labour one Juror to appear.

Counsellors.

But Counsellors at Law may plead for their Money at the Bar, but they must not labour the Jury privately ; and if they take Money for this, they are Embraceors, *F. N. B.* 171.

Fined for taking Money after their Verdict.

So much doth the Law hate that Jurors should privately take Money for their Verdict, that certain Jurors were fined for taking Money after their Verdict, though there was no Pre-engagement for it, 39 *Affize* p. 19.

The Practice is otherwise at this Day ; if it were not, the *Middlesex* Juries would not so court the Bailiffs to return them, especially to Trials at Bar, where five Pounds a Man is frequent Gratuity, sometimes more.

Issues.

If a full Jury appear, and some are challenged off, so that the Jury remains for Default of Jurors, the Defaulters shall lose their Issues, 4 *H.* 6. 7. Otherwise if a Jury be sworn, and one is withdrawn by Consent.

But if there be a Joinder of Counties, and a Jury of one County appear, and not of the other ; the Defaulters of that County from which enough came, shall not lose their Issues, because the Inquest doth not remain for their Default, but for the Default of them of the other County, 48 *Aff.* 5. *Mes quære.*

If

If the Jurors at the Return of the *Scire facias* make Default, yet they shall not be amerced, because the Parties may be claimed at the first Day, but at the Return of the *Habeas Corpora* they shall, 10 E. 4. 19. 1 E. 3. 12.

If any of the Jurors appears, the Court may charge them to inquire if any of the other Jurors were within the Town after the Return; and if they find they were, they shall be demanded upon a *Peine*, and if they come not, they shall be amerced, *Roll. tit. Trial*, 632.

A Juror was challenged, and six other Jurors were sworn to try the Challenge, who found him indifferent, and thereupon the Juror was demanded, but did not appear; for which Default he was fined the Value of his Lands for a Year; and the other Jurors inquired of the Value, &c. although the other Party then would have challenged him when he was demanded, so that he might have been *treit*; but the Court would not admit this, because then the King would have lost his Fine, 36 H. 6. 27.

If a Juror appear, and is adjourned upon Pain, and makes Default, in this Case, because he shall be fined to the Value of his Land *per Annum*, this shall be inquired by his Companions of the Jury, because the Court knows not the Value of his Land, *Lib. 8. 41*.

A Verdict was taken from the Fore-man of the Jury, to which one of them did not assent, and Damages assessed to twenty Shillings, in Trespass and Assault; and afterwards, every one of the eleven were fined, for giving their Verdict before they were all agreed, 40 *Affize* 10.

Amercement.

Demand sur peine.

Juror fined for departing when he was challenged.

Juror adjourned upon Pain.

Fined for giving a Verdict before they were agreed.

The Fine
must not be
joint.

Where a Jury are to be fined, a Fine jointly imposed on them, is not legal, but they must be severally fined, because the Offence of one, is not the Offence of another. *Et nemo debet puniri pro alieni delicto.* For then it might be said, *Rutilius fecit, Æmilius plectitur,* Lib. 11. 42.

Punishment
for striking a
Juror.

A Man struck a Juror at *Westminster* (sitting in the Court) who passed against him, and he was thereof indicted and arraigned at the King's Suit, and attainted; his Judgment was, That he should go to the *Tower*, and stay there in Prison all Days of his Life, and that his Right Hand should be cut off, and his Lands seized into the King's Hands, 41 *Affize*, p. 25. And now our Juror sees what Punishment it is to strike him in the Face of the Court, let him hold his Hands from others lest the same Judgment light on him.

Issues.

By the Statute of 27 *Eliz.* c. 6. It is enacted, That upon every first Writ of *Habeas Corpora* or *Disfringas*, with a *Nisi prius*, ten Shillings shall be returned as Issues, upon every Person impanelled, and upon the second Writ, twenty Shillings, and upon the third thirty Shillings. And upon every Writ that shall be farther awarded to try any Issue, to double the Issues last afore specified, until a full Jury be sworn.

And these Issues being returned upon a Tenant in Fee-simple, in Tail or for Life, of another, or of himself, or in the Right of his Wife; the Land he then hath will be chargeable for it, and any Man's Cattle upon this Land may be distrained for it.

Not sum-
moned.

But if the Under-Sheriff, &c. return a Juror summoned, who in Truth was not legally summoned, and therefore doth not appear,
and

and so loseth Issues, the Under-Sheriff shall pay him double the Value of the Issues lost. See the Statutes of 35 H. 8. 6. and the 2 E. 6. 32.

And *Note*, The Law hath been so careful to punish all Offenders, who would endeavour to bias and corrupt the Jury; and to punish the Juries themselves, if they receive Money to give their Verdict, or any otherwise pre-engage themselves to any of the Parties, all which is to the End that a true and honest Verdict may be given: What Punishment shall that Jury have which gives a false Verdict?

Such a Punishment, that (as I said before) in Civil Causes, it is without Example: And surely, if the Jurors did bear it in their Minds, their Verdicts would be always grounded upon their Evidence; and not upon their own Interest, or any Partiality to either of the Parties.

Wherefore if the Jurors give a false Verdict (which is Perjury of the highest Degree) upon an Issue joined between the Parties in any Court of Record, and Judgment thereupon, the Party grieved may bring his Writ of Attaint, in the *King's Bench* or *Attaint. Common Pleas*; upon which twenty-four of the best Men in the County are to be Jurors, who are to hear the same Evidence which was given to the *Petit Jury*, and as much as can be brought in Affirmance of the Verdict, but no other against it. And if these twenty four (who are called the *Grand Jury*) find it a false Verdict; then followeth this terrible and heavy Judgment at Common Law upon the *Petit Jury*.

I. That

Judgment in
Attaint.

1. That they shall lose *Liberam legem* for ever, that is, they shall be so infamous, as they shall never be received to be a Witness, or of any Jury.

2. That they shall forfeit all their Goods and Chattels.

3. That their Lands and Tenements shall be taken into the King's Hands.

4. That their Wives and Children shall be thrown out of Doors.

5. That their Houses shall be rased and thrown down.

6. That their Trees shall be rooted up.

7. That their Meadow Grounds shall be ploughed up.

8. That their Bodies shall be cast into the Gaol, and the Party shall be restored to all that he lost, by Reason of the unjust Verdict. So odious is Perjury in this Case, in the Eye of the Common Law; and the Severity of this Punishment is to this End, *Ut pœna ad paucos, metus ad omnes perveniat*; for there is *Misericordia puniens*, and there is *Crudelitas parcens*. And seeing all Trials of real, personal, and mixt Actions depend upon the Oath of twelve Men, prudent Antiquity inflicted this severe Punishment upon them, if they were attainted of Perjury, 1 *Inst.* 294.

But now by the Statute of 23 *H. 8. Cap. 3.* The Severity of this Punishment is moderated, if the Writ of Attaint be grounded upon that Statute.

But the Party grieved, may at his Election, either bring his Writ of Attaint, at the Common Law, or upon that Statute; wherefore

fore let the Juror expect the greatest Punishment, when he offends, 3 *Inst.* 163, 222.

And so I conclude as to the Jurors, only with the Words of Fortescue, *Quis tunc (etsi immemor salutis animæ suæ fuerit) non formidine tantæ pænæ, & verecundia tantæ infamiæ veritatem non diceret sic Juratus?*

Who then, though he regard not his Soul's Health, yet for fear of so great Punishment, and for Shame of so great Infamy, would not upon his Oath, declare the Truth?

But as to our Practiser, I would give this one farther Advertisement, which relates also to Jurors.

When a Verdict has been given by a former Jury in the same Cause, and on the same Evidence, it is allowed to give the former Verdict in Evidence, and I have known this introduced by the Counsel, as obliging to the latter Jury, to find accordingly; intimating, that otherwise they do (in Effect) perjure the former twelve Men; which may amuse tender Minds, and draw them from the strict Inquiry into the Merits of the Cause, in Favour of their Predecessors; which is a palpable Mistake and Mis-information, for these Reasons.

1. The same Evidence in the former Cause and Trial (perhaps) was not so perspicuously delivered as in this.

2. This latter Jury may be of more sagacious and comprehensive Judgment than the former.

3. The Directions of the Court (which the Jury most heed) may be more clearly delivered to this Jury.

4. The

4. The Matter in Contest (perhaps) was not in the former Trial so clearly manag'd by the Counsel, being not so well instructed as afterwards.

5. And lastly, supposing the Evidence equally delivered by the Witnesses, apprehended by the Jury; directed by the Court, managed by the Counsel, yet it is no Perjury or Fault to differ in Judgment; for if twenty-four Jurymen were to try a Matter of Fact, and twelve were of one Opinion, and twelve of another, who is in Fault, while they judge according to the best of their Knowledge and Skill, to which (only) they are sworn? And it is a reasonable Kindness to Jurymen, to make good Constructions of differing Judgments among them, while we see how oft Judges themselves differ in their Opinions, on a Matter stated equally to them all, and that not only as to Matter of Law, but as to Matter of Fact, as attending Practisers may observe in Trials at Bar, in the several Judges several Directions. And this I thought good to advertise, for that I have known Verdicts gained on this unwarrantable Suggestion, against clear and express Evidence, and could instance some Cases, *Sed verbum sat, &c.*

As to the Difference betwixt the Judge and the Jury, and that Question which has made such a Noise, viz. *Whether a Jury is fineable for going against their Evidence in Court, or the Direction of the Judge?* I look upon that Question as dead and buried, since *Rushel's Case*, in my Lord *Vaughan's Reports*; yet some of the Ashes thereof I may sprinkle here without Offence. It doth appear there to have been resolved by all the Judges, upon a full Conference

ference at Serjeant's Inn, *That a Jury is not fineable for going against their Evidence, where an Attaint lies.* And that it is evident by several Resolutions of all the Judges, *That where an Attaint lies, the Judge cannot fine the Jury for going against their Evidence or Direction of the Court, without other Misdemeanour.*

And where an Attaint doth not lie, as in Criminal Causes upon Indictments, &c. my Lord Vaughan says these Words, *That the Court could not fine a Jury at the Common Law, where Attaint did not lie, I think to be the clearest Position that ever I considered, either for Authority or Reason of Law.* And one Reason for this (which can never be answered) is, the Judge cannot fully know upon what Evidence the Jury give their Verdict; for they may have other Evidence than what is shewed in Court. They are of the *Vicinage*, the Judge is a Stranger: They may have Evidence from their own personal Knowledge, that the Witnesses speak false, which the Judge knows not of; they may know the Witnesses to be stigmatized and infamous, which may be unknown to the Parties or Court.

And if the Jury knew no more than what they heard in Court, and so the Judge knew so much as they, yet they might make Different Conclusions, as oftentimes two Judges do; and therefore, as it would be a strange and absurd Thing to punish one Judge for differing with another in Opinion or Judgment; so it would be worse for the Jury, who are Judges of the Fact, to be punished for finding against the Direction of him who is not Judge of the Fact. But he that would be better satisfied in this Point, may read that Case, and the Authorities and Reasons given by my
Q Lord

Lord *Vaughan*, whom I must honour, as a Man of great Reason.

It is shewed in that Case, That much of the Office of Jurors, in order to their Verdict, is Ministerial, as not withdrawing from their Fellows after they are sworn; not receiving from either Side Evidence after their Oath, not given in Court; not eating and drinking before their Verdict, refusing to give a Verdict, and the like; wherein if they transgress, they are finable: But the Verdict it self when given, is not an Act Ministerial but Judicial, and according to the best of their Judgment; for which they are not fineable, nor to be punished but by Attaint.

Nor can any Man shew, that a Jury was ever punished upon an Information either in Law or the Star-Chamber, where the Charge was only, *For finding against their Evidence, or giving an untrue Verdict*, unless Imbracery, Subornation; or the like, were joined.

But the *Fining and Imprisoning of Jurors for giving their Verdicts*, hath several Times been declared in Parliament an Illegal and Arbitrary Innovation, and of dangerous Consequence to the Government, the Lives and Liberties of the People. This celebrated Trial by Juries having been confirmed by many Parliaments.

Keeble 2 Part,
180. 1 Part,
162.

Hardres Rep. *Littleton*, Sect. 368. tells us, That as the Jury may find the Matter at large, that is, a Special Verdict, (which the Court cannot refuse, if it be pertinent to the Matter put in Issue) and leave the Law to the Court, so if the Jury will, they may take upon them the Knowledge of the Law upon the Matter, and may give their Verdict generally, as is put in their Charge. As for Example, upon all General

Hardres Rep.
409.

neral Issues, as Not guilty pleaded in Trespass, *Nil debet* in Debt, *Nul tort*, *Nul disseisin* in Assize, *Ne disturba pas* in *Quare impedit*, &c. Though it be Matter of Law, whether the Defendant be a Trespasser, a Debtor, Disseisor or Disturber, in the particular Cases in Issue; yet the Jury find not (as in a Special Verdict) the Fact of every Case by it self, leaving the Law to the Court, but find for Plaintiff or Defendant upon the Issue to be tried, wherein they resolve both the Law and the Fact complicate, and not the Fact by it self. And so upon Not guilty to an Indictment of Felony, Breach of the Peace, Trespass, &c. and other Cases where the Law and the Fact are complicate and joined, they may determine upon both; yet I must give them my Lord Coke's Caution, which is, That although the Jury, if they will, may take upon them the Knowledge of the Law, and give a general Verdict, yet it is dangerous for them so to do, for if they do mistake the Law, they run into the Danger of an Attaint. Therefore to find the Matter specially, is the safest Way where the Case is doubtful.

And to end, as I began, That *Decantatum* in our Books (as my Lord Vaughan calls it) *Ad questionem facti non respondent Judices, ad questionem legis non respondent Juratores*, literally taken, is true; for if it be demanded what is the Fact? the Judge cannot answer it. If it be asked what the Law is in that Case? the Jury cannot answer it. But upon the General Issue, if the Jury be asked the Question, Guilty or not? which includes the Law, they resolve both Law and Fact, in answering Guilty or Not guilty. So as tho' they answer not singly to the Question what

is the Law? Yet they determine the Law in all Matters where Issue is joined and tried, but where the Verdict is special. But in such Cases the Judge cannot of himself answer or determine one Particle of the Fact, but must leave it to the Jury, with whom let it rest and continue for ever, as the best kind of Trial in the World for finding out the Truth; and the greatest Safety of the just Prerogatives of the Crown, and the just Liberties of the Subject; and he which desires more for either of them, is an Enemy to both.

C H A P. XIV.

The Learning of General Verdicts, Special Verdicts, Privy Verdicts, and Verdicts in open Court; and where the Inquest shall be taken by Default, Inquests of Office, &c. Arrest of Judgment, Variance betwixt the Nar. and the Verdict, &c.

Verdict or Verdict; in Latin, *Vere dictum*, Verdict. *quasi dictum veritatis*, as *Judicium est quasi Juris dictum*, is the Answer and Resolution of those twelve Men, concerning the Matter of Fact referred to them by the Court, upon the Issue of the Parties. And this is the Foundation upon which the Judgment of the Court is built, for *ex facto jus oritur*; the Law ariseth from the Fact; wherefore it is no Wonder, that the Law hath ever been so curious and cautelous, as not to believe the Matter of Fact, until it is sworn by twelve sufficient Men of the Neighbourhood where the Fact was done, whom the Law supposeth to have most Cognizance of the Truth or Falshood thereof, which being sworn (for the Words are, *Juratores prædict. dicunt super sacram. suum, &c.*) is the Verdict whereof we now treat: And such Credit doth the Law give to Verdicts, that no Proof will be admitted to impeach the Verity thereof, so long as the Verdict stands not reversed by Attaint. And therefore upon an Attaint, no *Superfedeas* is grantable by Law, *Plo. Com. 496.*

The Credit
of Verdicts.

And it is worth our Observation, that the Law seems to take more Care of the Fact, than of her self; for the major Part of the Judges give the Judgment of the Law, tho' the other Judges dissent. But every one of the twelve Jurors must agree together of the Fact, before there can be a Verdict, which must be delivered by the first Man of the Jury, 29 *Affizes* Pl. 27.

General or
Special.

General Ver-
dict.

And this Verdict is of two Kinds, viz. one general, and the other special, or at large.

The general Verdict is positively, either in the Affirmative or Negative; as in Trespass, upon Not guilty pleaded, the Jury find Guilty or Not guilty; and so in an Affize of *Novel disseisin*, brought by A. against B. the Plaintiff makes his Complaint, *Quod B. disseisivit eum de 20 Acriis terræ, cum pertinentiis*: The Tenant pleads, *Quod ipse nullam injuriam seu disseinam præfato. A. inde fecit, &c.* The Recognitors of the Affize do find, *Quod prædict' B. injuste & sine judicio disseisivit prædict' A. de prædict' 20 Acriis terræ cum pertinentiis, &c.* This is a general Verdict, 1 *Inst.* 228.

Special Ver-
dict.

1 *Inst.* 226.

A special Verdict, or Verdict at large, is so called, because it findeth the special Matter at large, and leaveth the Judgment of the Law thereupon, to the Court; of which kind of Verdict it is said, *Omnis Conclusio boni & veri judicii sequitur ex bonis & veris premissis, & dictis Furatorum.* And as a Special Verdict may be found in common Pleas, so may it also be found in Pleas of the Crown, or Criminal Causes that concern Life or Member.

The Court
cannot refuse
it.

And it is to be observed, that the Court cannot refuse a Special Verdict, if it be pertinent to the Matter in Issue, 1 *Inst.* 228.

It hath been questioned, whether the Jury could find a Special Verdict, upon a Special Point in Issue, or no, as they might upon the general Issue. But this Question hath been fully resolved in many of our Books; first in *Plo. Com.* 92. It is resolved, That the Jury may give a Special Verdict, and find the Matter at large, *en chesun issue en le monde*, so that the Matter found at large, tend only to the Issue joined, and contain the Certainty and Verity thereof, *Lib.* 9. 12.

And in 2 *Inst.* 425. upon Collection of many Authors, it is said, That it hath been resolved, that in all Actions, real, personal and mixt, and upon all Issues joined, general or special, the Jury might find the special Matter of Fact, pertinent, and tending only to the Issue joined, and thereupon pray the Discretion of the Court for the Law. And this the Jurors might do at Common Law, not only in Cases between Party and Party, but also in Pleas of the Crown, at the King's Suit, which is a Proof of the Common Law. And the Statute of *Westminster*, the 2 *Cap.* 30. is but an Affirmative of the Common Law.

And as this Special Verdict is the safest for the Jury, 1 *Inst.* 228. so in many Cases it is most advantageous to the Party, and helps him where his own Pleading cannot. As for Example, saith *Littleton*, *Sect.* 366, 367, 368. Albeit a Man cannot in any Action plead a Condition, which toucheth and concerns a Freehold, without shewing Writing of this; yet a Man may be aided upon such a Condition, by the Verdict of twelve Men, taken at large in an Affize of *Novel disseisin*, or in any other Action, where the Justices will take the Verdict of twelve Jurors at large: As put the

A Special Verdict may be found upon any Issue, as upon an *absq; hoc, &c.*

A Freehold upon Condition, without Deed, may be found by Verdict, though it cannot be pleaded.

Case, a Man seized of certain Land in Fee, letteth the same Land to another for Term of Life, without Deed, upon Condition to render to the Lessor a certain Rent, and for Default of Payment, a Re-entry, &c. By force whereof the Lessee is seized as of Freehold; and after, the Rent is behind, by which the the Lessor entred into the Land, and after the Lessee arraign an Affize of *Novel disseisin* of the Land against the Lessor, who pleads that he did no Wrong nor *Disseisin*. And upon this an Affize is taken. In this Case, the Recognitors of the Affize may say, and render to the Justices their Verdict at large, upon the whole Matter; as to say that the Defendant was seized of the Land in his Demesne as of Fee, and so seized, let the same Land to the Plaintiff for Term of his Life, rendring to the Lessor such a yearly Rent, payable at such a Feast, &c. Upon such Condition, that if the Rent were behind at any such Feast, at which it ought to be paid, then it should be lawful for the Lessor to enter, &c. By Force of which Lease the Plaintiff was seized in his Demesne as of Freehold; and that afterwards, the Rent was behind at such a Feast, &c. By which the Lessor entred into the Land, upon the Possession of the Lessee. And pray the Discretion of the Justices, if this be a *Disseisin* done to the Plaintiff or not. Then, for that it appeareth to the Justices, that this was no *Disseisin* to the Plaintiff, insomuch as the Entry of the Lessor was congeable on him, the Justices ought to give Judgment, that the Plaintiff shall not take any Thing by his Writ of Affize; and so in such Case the Lessor shall be aided, and yet no Writing was ever made of the Condition: For as well as the

the Jurors may have Conufance of the Lease, they alfo may as well have Conufance of the Condition, which was declared and rehearfed upon the Lease.

In the fame Manner it is of a Feoffment in Fee, or a Gift in Tail, upon Condition, although no Writing was ever made of it. And as it is faid of a Verdict at large, in an Affize, &c. In the fame Manner it is of a Writ of Entry, founded upon a Diffeifin, and in all other Actions where the Juftices will take the Verdict at large, there where fuch Verdict at large is made, the Manner of the whole Entry is put in Ifsue.

But in Affize of Rent, it cannot be found to be upon Condition, unlefs they alfo find the Deed of the Condition.

So of a Confirmation in Fee to Leffee for Years.

Per Hale Chief Juftice, *Guildhall, Hill. 1671.* A Special Verdict may be found as to Damages in an Action of the Cafe; as the Cafe was there, *viz. Pro Quer'*, and if fo, &c. then fuch Damages; if fo, &c. then Damages fuch; and he faid, *He had known it fo done in Debt, and the Damages three Ways.*

Alfo in fuch Cafe where the Inqueft may give their Verdict at large, if they will take

upon them the Knowledge of the Law upon the Matter, they may give their Verdict generally, as is put in their Charge, as in the Cafe aforefaid, they may well fay that the Leflor did not diffeife the Leffee, if they will, &c.

Note, The Court cannot refuse a general Verdict, if the Jury will find it; it was fo

held before Juftice *Wyndham*, *Lent Affizes, 1681.* in *Verdon's Cafe* at *Can. br. dge.*

But

The Jury may likewise find *Estoppel*, which cannot be pleaded as in the second Report, f. 4. it well appears, where one *Goddard*, Administrator of *James Newton*, brought an Action of Debt against *John Denton*, upon an Obligation made to the Intestate, bearing Date the 4th Day of *April*, Anno 24 *Eliz.* The Defendant pleaded, that the Intestate died before the Date of the Obligation, and so concluded that the said *Escript* was not his Deed, upon which they were at Issue.

And the Jury found that the Defendant delivered it as his Deed, *July 30. Anno 23 Eliz.* and found the Tenor of the Deed *in hac verba, Novitint Universi, &c. Dat. 4. Aprilis, Anno 24 Eliz.* And that the Defendant was alive *30 July, Anno 23 Eliz.* And that he died before the said Date of the Obligation, and prayed Consideration of the Court, if this was the Defendant's Deed: and it was adjudged by *Anderson* Chief Justice, *Wyndham*, *Piriam* and *Walmesley*, That this was his Deed;

Note, That a Deed may be pleaded to be delivered after the Date, but not before, because it shall not be intended written before the Date, which may be after the Date. 12 H. 6. 1. As in Waste supposed in A.

and the Reason of the Judgment was, that although the Obligee in pleading cannot allege the Delivery before the Date, as it is adjudged in 12 H. 6. 1. which Case was affirmed to be good Law, because he is estopped to take an Averment against any Thing expressed in the Deed; yet the Jurors who are sworn *ad veritatem dicend* shall not be estopped. For an Estoppel is to be concluded to speak the Truth, and therefore Jurors cannot be estopped, because they are sworn to speak the Truth.

to plead that A. is a Hamlet in B. and not a Town of it self, admitteth the Waste, &c. 9 H. 6. 66. and the Jury cannot find no Waste, for that would be against the Record.

But

But if the Estoppel or Admittance, be within the same Record in which the Issue is joined, upon which the Jurors give their Verdict, there they cannot find any Thing against this, which the Parties have affirmed and admitted of Record, although it be not true; for the Court may give Judgment upon a Thing confessed by the Parties, and the Jurors are not to be charged with any such Thing, but only with Things in which the Parties vary, *ibid. lib. 5. 30.*

So Estoppels which bind the Interest of the Land, as the taking of a Lease of a Man's own Land, by Deed indented, and the like being specially found by the Jury, the Court ought to judge, according to the special Matter; for albeit Estoppels regularly must be pleaded and relied upon, by apt Conclusion, and the Jury is sworn *ad veritatem discend.* yet when they find *veritatem facti*, they pursue well their Oath, and the Court ought to judge according to Law. So may the Jury find a Warranty being given in Evidence, though it be not pleaded, because it bindeth the Right, unless it be in a Writ of Right, when the *Mise* is joined upon the meer Right, *Warranty, not pleaded.*
1 Inst. 227.

Verdicts ought to be such, that the Court may go clearly to Judgment thereon, and therefore Verdicts finding Matter incertainly, or ambiguously, are insufficient and void, and no Judgment shall be given thereupon. As if an Executor plead *Plene Administravit*, and Issue is joined thereon, and the Jury find that the Defendant hath Goods within his Hands to be administred, but find not to what Value, this is an Uncertainty, and therefore an insufficient Verdict, *Lib. 9. 74. 1 Inst. 227.*

In

Special Verdict.

In all Special Verdicts, the Judges will not adjudge of any Matter of Fact, but this which the Jury declare to be true of their own finding. And therefore the Judges will not adjudge upon an Inquisition, or *aliquid Tale* found at large in a Special Verdict, for their finding of this is not an Affirmation, that all which is in this is true, *Siderfin* 2 Part, 86.

The Office of the Jury.

It is the Office of the Jurors to shew the Verity of the Fact, and leave the Judgment of the Law to the Court. And therefore upon an Indictment of Murder, *Quod felonice percussit, &c.* If the Jury find *percussit tantum*, yet the Verdict is good; for the Judges of the Court are to resolve upon the Special Matter, whether it was *felonice*, and so Murder, or not, *Lib.* 9. 69. And if the Court adjudge it Murder, then the Jurors in the Conclusion of their Verdict, find the Felon guilty of the Murder contained in the Indictment.

Verdict finding Part of the Issue.

A Verdict that finds Part of the Issue, and finding nothing for the rest, is insufficient for the whole, because they have not tried the whole Issue wherewith they are charged: As if an Information of Intrusion be brought against one, for intruding into a Messuage and an hundred Acres of Land: Upon the general Issue, the Jury find against the Defendant for the Land, but say nothing for the House, this is insufficient for the whole.

Moer 406.

Finding more than the Issue.

Where fatal, *Siderfin* 96. *Kable* 1 Part, 289.

But if the Jury give a Verdict of the whole Issue, and of more, &c. that which is more is Surplusage, and shall not stay Judgment: For *Utile per inutile non vitiatur*. *Leon.* 1 Part, 66. *Cro.* 1 Part, 130. But necessary Incidents required by Law, the Jury may find, *Siderfin* 232.

If the Issue be upon a Descent, and the Jury find the same, and a continual Claim, that as to the continual Claim is Surplusage, 7 H. 6. 8, 9, 10.

In some Cases the Verdict may be found for the Plaintiff, and yet he shall be barred.

As 40 Aff. 6. in a *Mortdancester*, all the Points of the Writ found for the Plaintiff, and yet he was barred for this Reason, for although he was Heir to his Father, yet because the elder Brother by the half Blood did enter, he was barred.

Yet in many Cases, nay almost in all, the Jury ought to find more than is put in Issue, otherwise their Verdict is not good; and therefore they are to assess Damages and Costs, because it is Parcel of their Charge, as a Consequent upon the Issue, though it be not Part of the Issue *in terminis*, Lib. 10. 119.

A Verdict must be sufficient in Matter and Form, be the same special or general, and therefore they must lay Damages and Costs where the same ought to be found.

An Action of the Case on Deceit was brought, for that he sold unto the Plaintiff two Oxen, and warranted them to be sound; on Not guilty, the Jury found him guilty as to one, and not guilty to the other; and good; for that the Action was founded not on the Contract, but the Deceit, 3 Cro. 884. *Gravenor and Mete.*

In Debt the Plaintiff declares that he had Judgment against Baron and Feme for a Debt of the Wife's, *dum sola*, &c. that they were in Execution and suffered to escape, the Jury found the Husband only in Execution

cution and escaped, and Judgment for the Plaintiff, *Roberts versus Herbert, Hill. 12 Car. 2. C. B.*

Damages by
the first In-
quest.

Attaint.

So in Trespass against two, one comes and pleads Not guilty, and is found guilty. In this Case, the first Inquest shall assess Damages for the whole Trespass, by both Defendants; and afterwards the other comes and pleads Not guilty, and is found guilty: The finding of Damages by the first Inquest, to which he was not Party, shall bind him; and therefore if the Damages are outrageous, and excessive, the Defendant in the last Inquest shall have an Attaint, *Lib. 10. 119.*

So in Trespass, *Quare clausum fregit*, if Issue be joined upon a Feoffment, and the Jury give outrageous Damages, an Attaint lies; for the Inquiry of Damages is consequent and dependent upon the Issue, and Parcel of their Charge, *ibid.*

Damages by
the first In-
quest.

In the 11th Report, *fol. 5.* It was resolved, That in Trespass against two, where one comes and appears, &c. against whom the Plaintiff declares with a *simul cum*, &c. who pleads and is found Guilty, and Damages assessed by the Inquest, and afterwards the other comes and pleads, and is found guilty; the Defendant which pleaded last shall be charged with the Damages taxed by the first Inquest; for the Trespass which the Plaintiff had made joint by his Writ and Count, and done at one Time, cannot be severed by the Jurors, if they find the Trespass to be done by all, at one and the same Time as the Plaintiff declared.

So in Trespafs against divers Defendants, if they plead Not guilty, or several Pleas, and the Jury find for the Plaintiff in all, the Jurors cannot assess several Damages against the Defendants, because all is but one Trespass, and made joint by the Plaintiff, by his Writ and Count. And although that one of them was more malicious, and *de facto* did more and greater Wrong than the others, yet all came to do an unlawful Act, and were of one Party, so that the Act of one, is the Act of all of the same Party being present. But in Trespafs against two, if the Jurors find one guilty at one Time, and the other at another Time, there several Damages may be taxed. But if the Plaintiff bring an Action of Trespass against two, and declare upon a several Trespass, his Action shall abate. And this is the Diversity between the finding of the Jury, and the Confession of the Party.

Several Damages.
Vide Devant,
cap. 4.

And in Trespafs, where the Defendants plead several Pleas, all triable by one Jury, and they find generally for the Plaintiff, the Jurors cannot sever the Damages; if they do, their Verdict is vicious.

If the Declaration be of several Damages, touching every part in several, the Verdict ought to find the Damage several, as the Declaration is.

So in Waste, for every several Parcel.

Waste.

So in a *Premunire*, against the Principal and Accessary.

Premunire.

So in a forcible Entry, where some are Found to detain forcibly, and others to enter forcibly.

If one be found Guilty of several Trespasses, the Damages may be entire.

If

Jeofail.

If one of the Issues be a Jeofail, and the Damages intirely assessed, 'tis ill in both.

Cost.

But Cost in these Cases must be intire.

Judgment,
de melioribus
dampnis.

But in Trespas against two, where one appears and pleads Not guilty to a Declaration against him, with a *Simul cum, &c.* and afterwards the other appears and pleads Not guilty to a Declaration against him also with a *Simul cum, &c.* Whereupon two *Venire fac.* issue out, and one Issue tried after the other, and several Damages assessed: In Judgment of the Law, the several Juries give one Verdict, all at one Time, and the Plaintiff hath his Election to have Judgment *de melioribus dampnis*, by any of the Inquests. And this shall bind all, but *fiat nisi una Executio.*

Damages.

It is a Maxim, That in every Case where an Inquest is taken by the Mise of the Parties, by the same Inquest shall Damages be taxed by all. And in *Mich. 39 H. 6. fol. 1.* In an Action of Trespas against many, (who pleaded in Bar the Term before) and one of them made Default which was recorded: There it is resolved by all the Court, That for saving of a Discontinuance, a Writ of Inquiry of Damages shall be awarded; but none shall issue out, because he shall be contributory to the Damages taxed by the Inquest, at the Mise of the Parties, if it be found for the Plaintiff: And if it be found against the Plaintiff, then the Writ of Enquiry shall issue forth.

Writ of In-
quiry.

And the Reason wherefore no Writ shall issue out at first, to inquire of Damages, until, &c. is, because that if a Writ should issue out, and be executed, this is nothing but an

Inquest of Office, and not at the Mife of the Parties, and yet this Inquiry (if it might be allowed) ought to serve for all the Damages; for Inquiry of Damages shall not be twice, and the others which have pleaded to Inquests of the Issue, be found against them, shall be chargeable to those Damages which are found by the Inquest of Office; and if they be excessive, they shall have no Remedy, although there be no default in them: For they cannot have an Attaint, because it is but an Inquest of Office.

So in Trespass or *Assumpsit* against two, if one confess the Action, or let it go by *Nil dic.* and the other plead, the Jury upon the Issue shall assess the Damages against both, *Keble*, 1 Part, 623.

But in Trespass against two, who plead Damages by Not guilty, &c. severally; and several *Venire* the first In-
facias awarded, the Inquest which first passes, quett.
shall assess Damages for all, and the second Inquest ought not to assess Damages at all, but that the Defendant shall be contributory to the Damages assessed by the first Jury, notwithstanding he is not Party to it; yet if these Damages be excessive, he shall have an Attaint, because, though he is a Stranger to the Issue, yet in Law, he is privy in Charge. And so no Damage or Mischief can accrue to to him in this Case.

Now let us see when something is left out Verdict,
of the Verdict, which the Jury ought to have when to be
inquired of, whether it may be supplied by supplied by
Matter *ex post facto*; and how: And for this, Writ of In-
know, That if Damages be left out of a Ver- quiry, &c.
dict, this Omission cannot be supplied by *vide hic*,
Writ of Inquiry of Damages; for this would cap. 6.

R

pre-

prevent the Defendant of his Remedy by Attaint, which would be very mischievous; for then such Omission might be on purpose to deprive the Plaintiff of his Attaint, *Lib. 10. 119.*

And the Rule is, That when the Court *ex Officio*, ought to inquire of any Thing, upon which no Attaint lies, there the Omission of this may be supplied by a Writ of Inquiry of Damages; as in a *Quare Impedit*, if the Jury omit to inquire of these four Things, that is to say, *de plenitudine, ex cujus præsentatione, si tempus semestre transierit*, and the Value of the Church *per Annum*, there the Plaintiff may have a Writ to inquire of these Points, *Dyer 241, 260.* because of these no Attaint lies, as it is holden in *11 H. 4. 80.* because that as to these, the Inquest is but of Office. But in all Cases, where any Point is omitted, whereof no Attaint lieth, there this shall not be supplied by Writ of Inquiry, upon which no Attaint lieth. And therefore in Detinue, if the Jury find Damages and Cost, and no Value as they ought, this shall not be supplied by Writ of Inquiry of Damages, for the Reason aforesaid, *Ibid. Et sic in similibus.*

Keble, 1 Part, 882.
In Replevin. The Plaintiff was Nonsuit. And upon the Statute *17. Car. 2. 7.* the Jury inquired of the Value of the Cattel, *scil. 55 l. and da. 12 d.* But they did not inquire what Rent was arrear: And it was moved to supply it by a new Writ of Inquiry, as in a *Quare Impedit*; but 'twas answered, that the Statute says, in case of a Nonsuit, the same Jury shall inquire of the Value of the Cattle, and the Rent-Arrear, *Siderfin 480. Keble, 2 Part, 409.*

Abatement. A Verdict upon an Issue or Misnomer, pleaded in Abatement, is peremptory, and if the

the Jury omit to find Costs, they cannot be supplied by a Writ of Inquiry, &c. *Keble*, 2 Part, 545.

But how then? What, shall the Plaintiff lose the Benefit of his Verdict, because the Jury assessed no Damages, or did insufficiently assess them? *Certes* in such Cases where Damages are only to be recovered, he must lose the whole Benefit of his Verdict; but where any Thing else is to be recovered besides Damages, as in Debt, Ejectment, &c. he may release his Damages, and have Judgment upon his Verdict as to the rest. And so where Damages are to be recovered, if part of them are assessed insufficiently, and part well, he may have Judgment for those Damages well assessed. And oftentimes the Insufficiency of the Declaration shall set aside the Verdict; as if an Action upon the Case be brought upon two Promises, and one of them be insufficiently laid, and the Verdict give intire Damages, this is naught for the whole; but if the Damages had been severally assessed upon the several Promises, then the Verdict as to the Promise well laid, should have stood, *Lit. Rep.* 6. 2 *Keble*. 488.

Verdict set aside, because the Damages not well assessed.

Release Damages.

Carter's Rep. 51.

Verdict set aside in Part, for Insufficiency in the Declaration.

In the 11th Report, fol. 56. *Marsh* brought a Writ of Annuity against *Bentham*, and the Parties descended to Issue, which was tried for the Plaintiff, and the Arrearages found, &c. But the Jurors did not assess any Damages or Cost; which Verdict was insufficient, and could not be supplied by Writ of Inquiry of Damages: Wherefore the Plaintiff released his Damages and Costs, and upon this had Judgment; upon which the Defendant brought a Writ of Error, and assigned the Error aforesaid, *scil.* the Insufficiency of the Verdict, *sed*

Release of Damages where none were assessed.

Judicium affirmatur, because the Plaintiff had released his Damages and Costs, which is for the Benefit of the Defendant.

In *Detinue* of Charters, on *Non detinet*, Verdict for the Plaintiff, and Damages, but the Jury did not find the Value of the Deeds, and a Writ of Inquiry was awarded to that purpose, and returned, and ruled good; and by *Twisden* Justice, Debt against Executor, who pleads *plene*, &c. And it is found against him, and the Jury give no Damages, that cannot be aided by Writ of Inquiry, *Burton* versus *Robinson*. Pasch. 17 Car. 2. B. R.

Release of Damages where they were not well assessed.

In *Dyer* 22 Eliz. 369, 370. In a Writ of *Ejectione Custodiae terræ & hæredis*, the Jurors assessed Damages intirely, which was insufficient; for it lay not for the Heir, yet the Plaintiff released his Damages, and had Judgment for the Land: And Note, That insufficient Assessment of Damages, and no assessing is all one.

Damages and Costs.

The Jury ought to assess no more Damages *pro injuria illata*, than the Plaintiff declares for; but they may assess so much, and moreover, give Costs, which is called *Expensæ litis*; though in the proper and general Signification *Dampnum* also comprehends Costs of Suit, as the Entry, reciting both Damages and Costs, well affirms, *scil. Quæ dampna in toto se attingunt cum*, &c.

More Damages than the Plaintiff declares for.

But if the Jury do assess more Damages than the Plaintiff declares for, the Plaintiff may remit the Over-plus, and pray Judgment for the Residue, as in the 10th Report, f. 115. In *Trespas*, the Plaintiff declared *ad dampnum*, &c. 40 l. At the Trial the Jury assessed Damages *occasione transgressionis prædictæ*. ad 49 l. And for Costs of Suit 20 s. Upon which Verdict

dict, the Plaintiff, at the Day in Bank, remitted 9*l.* Parcel of the said 49*l.* assessed for Damages, and prayed Judgment for 40*l.* (to Damages re- which Damage he had counted) with Increase mitted. of Costs of Suit, and had 9*l.* *de Incremento*, added by the Court, which in all amounted to 50*l.* and had his Judgment accordingly; upon which a Writ of Error was brought, and the Judgment affirmed.

For as in real Actions, the Demandant shall not count to Damages, &c. because it is uncertain to what Sum the Damages will amount, by reason he is to recover Damages *pendant le Brief*; so in the Case of Costs, he shall recover for the Expences depending the Suit, which being uncertain, cannot be comprehended in the Count, because the Count extends to Damages past, and not to Expences of Suit. For in personal Actions he counts to Damages, because he shall recover Damages only for the Wrong done, before the Writ brought, and shall not recover Damages for any Thing, *pendant le Brief*. But in real Actions, the Demandant never counts to Damages, because he is to recover Damages also, *pendant le Brief*, which are uncertain. Damages in real and personal Actions.

The Jury may, if they will, assess the Damages and Costs intirely together, without making any distinction, 18 E. 4. 23. But then they must not assess more Damages and Costs than the Damages are which the Plaintiff counts to, for if they do, the Plaintiff shall recover only so much as he hath declared for, without any Increase of Cost, because the Court cannot distinguish how much they intended for Cost, and how much for Damage. Damages and Costs intirely assessed.

R ;

As

As in 13 H. 7. 16, 17. One *Darrel* brought a Writ of Trespass, and counted to his Damage twenty Marks; the Defendant pleaded Not guilty, and the Jury taxed the Damages and Costs of Suit jointly to twenty-two Marks, and the Verdict was held to be good for twenty Marks, and void for the Residue, because it doth not appear how much was intended for Damages, and how much for Costs; so that there may be more Damages than the Plaintiff declared for, or less, and so the Court knows not how to increase the Cost; wherefore he shall have Judgment but for twenty Marks, by reason of the Incertainty.

Verdict amended by the Notes.

Where a special Verdict is not entred according to the Notes, the Record may be amended and made agree with the Notes at any Time, though it be three or four, &c. Terms after it is entred, *Lib. 4. § 2. Lib. 8. 162. Cro. 1 Part, 145.*

In the Case of *Turnor and Thalgate, Mich. 1658. B. R.* It was said *per Curiam*, That special Verdicts may be amended by the Notes, but the Notes cannot be amended or enlarged by any Averment or *Affidavit*, for that were to find a Verdict by the Court. Yet in that Case, where the Notes were, That the Judgment, &c. was vacated *prout per Rule*, the Verdict was amended, vacated *per Curiam prout per Rule*; for so is implied in the Notes.

Notes. See *Keeble, 1 Part, 504, 907.*

See a Verdict amended by the Notes after Judgment and Error brought, 1 *Roll. Rep. 82.*

Form. *Hob. 54.*

If the Matter and Substance of the Issue be found, it is sufficient, for precise Forms are not required by Law in special Verdicts, (which are the finding of Lay-Men) as in Plead-

Pleadings which are made by Men learned in the Law, and therefore Intendment in many Cases shall help a special Verdict, as much as a Testament, Arbitrement, &c. And therefore he which makes a Deputy, ought to do it by *Escript*; but when the Jury find generally, that *A.* was Deputy to *B.* all necessary Incidents are found by this; and upon the Matter they find, that he was made Deputy by Deed, because it doth tantamount, *Lib. 9. 51.* And in the 5th Report, *Goodal's Case*, It was resolved, That all Matters in a special Verdict, shall be intended and supplied, but only that which the Jury refer to the Consideration of the Court.

In all Cases where the Jury find the Matter committed to their Charge at large, and overmore conclude against Law, the Verdict is good and the Conclusion ill, *Lib. 4. 42.* And the Judges of the Law will give Judgment upon the special Matter according to the Law, without having Regard to the Conclusion of the Jury, who ought not to take upon them Judgment of the Law, *Lib. 10, 11. Vide hic 400.*

Ill Conclusion.
Moor 105, 269.
Litt. Rep. 135. 94, 106.

Where the Declaration in Trespass is, *Cum aliquibus averiis*, of a Number uncertain, and the Verdict is as general as the Declaration, *Cum aliquibus averiis*, there the Verdict is good, *Cro. 2 Part, 662.*

As general as the Nar.

In *Ejectione firmæ*, where the Plaintiff declared of a Messuage and three hundred Acres of Pasture in *D. per nomina* of the Manor of *Monkhal*, and five Closes *per nomina*, &c. Upon Not guilty, the Jury gave a special Verdict, *viz. quoad* four Closes of Pasture, containing by Estimation two thousand Acres of Pasture, that the Defendant was Not guilty,

Quoad resi-
duum, incer-
tain.

Quoad residuum they found Matter in Law: And it was moved by *Yelverton*, That this Verdict was imperfect in all: For when the Jury find that the Defendant was not guilty of four Closes of Pasture, containing by Estimation two thousand Acres of Pasture, it is uncertain, and doth not appear of how much they acquit him. And then, when they find *Quoad residuum*, the special Matter, it is uncertain what the Residue is, so there cannot be any Judgment given; and of that Opinion was all the Court, wherefore they awarded a *Venire facias de nova*, to try that Issue, *Cro. 2 Part, 113.*

Quoad resi-
duum.

Ejectione firmæ of thirty Acres of Land in D. and S. The Defendant was found guilty of ten Acres, and *Quoad residuum* Not guilty; and it was moved in Arrest of Judgment, That it is uncertain in which of the Vills this Land lay, and therefore no Judgment can be given: *Sed non allocatur*, and it was adjudged for the Plaintiff, for the Sheriff shall take his Information from the Party, for what ten Acres the Verdict was. *Cro. last Part, 465. diversitas apparet.*

Circumstan-
ces.

Where the Jury find Circumstances upon an Evidence given, to incite them to find Fraud, &c. yet the same is not sufficient Matter upon which the Court can judge the same to be Fraud, &c. *Brownlow, 2 Part, 187.* Yet in many Cases the Jury may find Circumstances and Presumptions, upon which the Court ought to judge. As to find that the Husband delivered Goods devised by the Wife. Upon this, the Court adjudged that the Husband assented to the Devise at first.

Moore 192.
Carter's Rep.
16.

Posse amend-
ed, how.

Where a Verdict is certainly given at the Trial, and uncertainly returned by the Clerk of

of the Assizes, &c. The *Postea* may be amended, upon the Judges certifying the Truth how the Verdict was given, 1 Cro. 338. See *Keb.* 2 Part, 875. Where the Court would not compel the bringing in the *Postea*, 1 Part, 346.

In many Cases a Verdict may make an ill Plea or Issue good. As in an Action for Words, *Thou wast perjured, and hast much to answer for it before God.* Exception after Verdict for the Plaintiff, in Arrest of Judgment: For that it is not laid in the Declaration, that he spake the Words *auditu quamplurimorum*; or of any one, according to the usual Form: *Sed non allocatur*; for being found by the Verdict that he spake them, it is not material, although he doth not say, *in auditu plurimorum*; whereupon it was adjudged for the Plaintiff, Cro. 1 Part, 199. So want of a Day in the Nar. made good by Verdict, *Keble*, 2 Part, 354.

Ill Plea, made good by Verdict
2 *Keb.* 362.

See Cro. last Part, 116. Where the Bar was ill, because no Place of Payment was alledged, yet the Payment being found by Verdict, it was adjudged well enough; for a Payment in one Place, is a Payment in all Places, *Keble*, 1 Part, 662, 771, 786, 793. *Siderfin* 306, 290, 341, 342, 379. *Littleton's Rep.* 184, 200, &c. *Modern Rep.* 42, 43. *Hardres Rep.* 42, 43.

In an Action of the Case, for Continuance of a Wall, by which the Plaintiff's Lights were stopped, in an ancient House. *Per Cur'*. The Plaintiff ought to shew the Wall was new, and is not helped by Verdict, *Keble*, 1 Part, 584.

Not guilty is a good Plea after Verdict in *Assumpsit*, so on *Non Assumpsit* the Jury may find the Defendant Guilty, *Keble*, 1 Part, 795.

In

In an Acton *sur Assumpsit*, laid twenty Years since, & *non cul. infra sex annos*, & *replic. infra sex annos*, which is a Departure, yet the Verdict helps it, *Keble*, 1 Part, 566.

In Pleading *riens avoit Jour del brief*, and said not *ne unique puis*, and the Jury find it, it is helped by the Verdict.

But *Drake* said, the same after Verdict was helped by the Statute of *Jeofails*.

The like 22 E. 4. 46. *Que le Baron ne fuit seisie que Dower Jour del Espousal*, &c.

So if an Executor plead *Riens enter mains jour del brief*, &c. and omit *ne unique puis*. 5 H. 7. 14.

Debt *versus*
Heir.

Debt brought upon a Bond against an Heir in the *Detinet* only, and upon *Riens per Discent* there was a Verdict for the Plaintiff, 'tis naught upon a Demurrer, but after Verdict is aided by the Statute 16 & 17 Car. 2. cap. 8. which is (after several Matters of Substance) thereby enacted to be amended after Verdict, and other Matters of like Nature, not being against the Right of the Matter in Suit, &c. shall not stay Judgment, *Siderfin* 342. *Keble*, 2 Part, 259, 278, 309, 470. 1 Part, 662, 771.

An Indictment of Extortion against a Bailiff, *quod colore officii extorsive & injuriose* he took Money, and sheweth not the particulars; good *per Curiam*, especially after Verdict, *Keble*, 1 Part, 357.

A Repleader
was denied,
Keble, 1 Part,
498, 829.

Way.

In Information for not repairing a Highway in their Parish. Upon *Non debent reparare*, the Verdict found so, for the Defendant. The Court held the Issue ill, because 'tis contrary to Law, the Way being in their own Parish, they ought to have shewed who cought to repair, and if the Verdict had found that

that the Defendant ought to repair, it had been well enough; however after Verdict, the Court gave Judgment, that the Defendant should be acquitted.

Trespas by Baron and Feme, *de clauso fracto*, of the Baron's, and for the Battery of the Feme, *ad dampnum ipsorum*. The Defendant, *Quoad* the *clausum fregit*, pleaded Not guilty, *Quoad* the Battery justifies. And for the first Issue, it was found for the Defendant; and for the second, for the Plaintiff, and now moved in Arrest of Judgment, That the Declaration is not good, because the Ba-

Baron and Feme.
Vide Keble,
1 Part, 944.
Count against Baron and Feme, of Trespas done, *cum a-veriis suis*, after Verdict, allowed good, 946.

ron joins the Feme with him in Trespas *de clauso fracto* of the Baron's, which ought not to be; but for the Battery of the Feme, they may join, whereto all the Court agreed; but it was moved, That in Regard it was found against the Plaintiffs for this Issue, in which they ought not to join, and the Defendant is thereof acquitted, and the Issue is found against the Defendant, for that part wherein they ought to join: This Verdict has discharged the Declaration for that Part which is ill,

and is good for the Residue. As in 9 E. 4. 51. Trespas by Baron and Feme, for the Battery of both: The Defendant pleaded Not guilty, and found Guilty, and Damages assessed for the Battery of the Baron, by it self, and for the Battery of the Feme, by it self, and Judgment was given for the Damages for the Battery of the Feme, and the Writ abated for the Residue. (And of that Opinion was *Lea*, Chief Justice, and *Dodridge al contra*.)

And the same Law I conceive, if the Jury had found the Defendant Not guilty of the Battery to the Husband, but guilty to the Wife, *Cro.* 2 Part, 655. *Palmer's Rep.* 338.

*Rochel and his
Wife against
Steel.*

Rochel and his Wife brought an Action of Trespass and Assault in the *Exchequer, Hill.* 1659. against *Steel* and others, who pleaded Not guilty, and the Verdict found *Steel* Guilty of Battery to the Wife, but found nothing concerning the Husband; wherefore Judgment was stayed; but the Barons held, That if the Jury had found the Defendant Not guilty, as to the Husband, then the Verdict had helped the Declaration, and the Plaintiff should have had Judgment for the Damages for the Battery of the Wife.

Horton and his Wife declared in Trespass for beating the Wife, *ad dampnum ipsorum*, and good, *Siderfin* 387.

Of what a
Verdict may
be.

Pl. Com. 411.

Incidents.

How con-
strued.

Outlaw.

Contents of a
Deed.

The Jury may find any Thing that may be given in Evidence to them, as Records, either Patent, Statute, or Judgment, Things done in another County or Country; for which see Evidence before. *Hob.* 227. And of those Things they ought to have Conusance; they are to have Conusance also, of all Incidents and Dependants thereupon; for an Incident is a Thing necessarily depending upon another, *Co. Lit.* 227. *b.*

If the Verdict may any Ways be construed good, a Construction to destroy it ought not to be made, *Carter's Rep.* 80, 94.

If one of the Jury be outlawed when the Verdict is found, the Verdict is not good, but may be reversed by Error.

In a special Verdict, the Case in Fact must be found clear to a common Intent, without Equivocation, *Vaughan's Rep.* 78.

If the Jury collect the Contents of a Deed, and also find the Deed *in hæc verba*, the Court is not to judge upon their Collection, but upon the Deed it self. The Jury may find the Con-

Contents of a Deed or Will proved by Witnesses, *lb.*

Trespafs for disturbing him of his Com-Common. mon belonging to an hundred Acres, and the Jury find Common for fifty, this is for the Plaintiff; otherwise upon an Avowry, or *Quod permittat*, which are founded upon the Right, *vide apud.* but the Trespafs is for Damages, *Palmer's Rep.*

289.

If the Matter and Substance of the Issue be found it is sufficient, though it be against the Letter of the Issue. As in the first *Institutes*, *fol. 114. b.* A *Modus decimandi* was alledged by Prescription Time out of Mind, for Tithes of Lambs, and thereupon Issue joined. And the Jury found, that before twenty Years then last past, there was such a Prescription, and that for these twenty Years, he had paid Tithe-Lamb in Specie. And it was objected first, That the Issue was found against the Plaintiff, for that the Prescription was general for all the Time of the Prescription, and twenty Years fail thereof. Secondly, That the Par-ty by Payment of Tithes in Specie, had waved the Prescription or Custom. But it was adjudged for the Plaintiff, for albeit the *Modus decimandi* had not been paid by the Space of twenty Years, yet the Prescription being found, the Substance of the Issue is found for the Plaintiff.

The Verdict may be against the Letter of the Issue, so the Substance is found.

Prescription.

In an Affize of *Darrein presentment*, if the Plaintiff alledge the Avoidance of the Church by Privation, and the Jury find the Voidance by Death, the Plaintiff shall have Judgment; for the manner of Voidance is not the Title of the Plaintiff, but the Voidance is the Matter, *1 Inst. 282.*

Avoidance.

If

Deprivation.

If a Guardian of an Hospital bring an Assize against the Ordinary, he pleadeth that in his Visitation he deprived him as Ordinary, whereupon Issue is taken, and it is found that he deprived him as Patron, the Ordinary shall have Judgment, for the Deprivation is the Substance of the Matter, *Ib.*

Breach of 20
Trees cut
down for 10.

The Lessee covenants with the Lessor not to cut down any Trees, &c. and binds himself in a Bond of forty Pounds for the Performance of Covenants. The Lessee cut down ten Trees, the Lessor bringeth an Action of Debt upon the Bond, and assigneth a Breach, That the Lessee cut down twenty Trees, whereupon Issue is joined, and the Jury find that the Lessee cut down ten: Judgment shall be given for the Plaintiff, for sufficient Matter of Issue is found for the Plaintiff to forfeit the Bond, *Ib.*

Indictment of
Murder, and
Verdict finds
Manslaughter,
Sid. 325.

And this Rule holds in criminal Causes: For if *A.* be appealed, or indicted of Murder, *viz.* that he of Malice premeditated killed *J.* *A.* pleadeth that he is Not guilty, *Modo & forma*, yet the Jury may find the Defendant Guilty of Manslaughter without Malice premeditated, because the Killing of *J.* is the Matter, and Malice premeditated is but a Circumstance, *Plo. Com 101.*

Modo & forma.

And generally where *modo & forma*, are not of the Substance of the Issue, but Words of Form, there it sufficeth, though the Verdict doth not find the precise Issue.

Alienation.

As if a Man bring a Writ of Entry *in casu proviso*, of the Alienation made by the Tenant in Dower to his Disinheritance, and counteth of the Alienation made in Fee, and the Tenant saith, That he did not alien in manner as the Demandant hath declared, and upon this

this they are at Issue, and it is found by Verdict, that the Tenant aliened in Tail, or for Term of another Man's Life. The Demandant shall recover, yet the Alienation was not in Manner as the Demandant hath declared, *Littleton*, Sect. 483.

Also if there be Lord and Tenant, and the Tenant hold of the Lord by Fealty only, and the Lord distrain the Tenant for Rent, and the Tenant bringeth a Writ of Trespass against his Lord, for his Cattle so taken, and the Lord plead that the Tenant holds of him by Fealty and certain Rent, and for that Rent behind he came to distrain, &c. And demand Judgment of the Writ brought against him, *Quare vi & armis*, &c. And the other saith, that he doth not hold of him in Manner as he supposed; and upon this they are at Issue. And it is found by Verdict, that he holdeth of him by Fealty only, in this Case the Writ shall abate, and yet he doth not hold of him, in Manner as the Lord hath said; for the Matter of the Issue is, Whether the Tenant holdeth of him or no; for if he holdeth of him, although that the Lord distrain the Tenant for other Services which he ought not to have, yet such Writ of Trespass, *Quare vi & armis*, &c. doth not lie against the Lord, but shall abate, *Littleton*, Sect. 485.

Trespass by the Tenant against the Lord.

Also in a Writ of Trespass for Battery, or for Goods carried away, if the Defendant plead Not guilty in Manner as the Plaintiff supposeth, and it is found that the Defendant is guilty in another Town, or at another Day, than the Plaintiff supposes, yet he shall recover.

The Verdict may find the Defendant guilty of the Trespass at another Day or Place.

So the Jury may find the Conspiracy at another Day, for the Day is but Form.

In

Battery.

In Battery, if the Defendant justifie at another Day with a Traverse, *Devant & apres*, he may be found guilty at another Day.

*Son assault de-
mesn.*

If the Defendant by his Plea agree with the Plaintiff in the Day, Year and Place, and the Plaintiff reply, *de son tort demesn sans tiel cause*, and the Defendant prove an Assault by the Plaintiff, the Plaintiff shall not give in Evidence a Battery at another Day, Roll. tit. Trial, 687. Vide *Devant*, cap. 11.

And so in many other Cases these Words, *scil. In Manner as the Demandant or the Plaintiff supposed*, do not make any Matter of Substance of the Issue, Littleton, Sect. 485.

Modo & forma
when Words
of Form, Si-
derfin 357.

And 'tis a Rule, That where the Issue taken goeth to the Point of the Writ or Action, there *Modo & forma* are but Words of Form, as in the Cases aforesaid.

When of
Substance, and
must be
found by the
Verdict.

But when a collateral Point in Pleading is traversed, as if a Feoffment be alledged by two, and this is traversed *Modo & forma*, and 'tis found the Feoffment of one, there *Modo & forma* is material; so if a Feoffment be pleaded by Deed, and it is traversed *Abſque hoc quod feoffavit modo & forma*, upon this collateral Issue, *Modo & forma* are so essential, as the Jury cannot find a Feoffment without Deed, Co. Littleton 282.

So in non As-
ſumpſit modo
& forma, up-
on an Indebi-
tatus aſſump-
ſit, there modo
& forma were not material. *ſeem*, when the Action is upon a Collateral Promise.

Treſpaſs
*Quare vi &
armis*, lies
not againſt
the Lord for
distraining
his Tenant,
without
Cause.

But here is a Diversity to be observed, That albeit the Issue be upon a collateral Point, yet if by the finding of Part of the Issue, it shall appear to the Court, that no such Action lieth for the Plaintiff, no more than if the whole had been found, there *Modo & forma* are but Words of Form, as in the aforesaid Case

Case of the Lord and Tenant, it plainly appears; for it was all one, whether the Tenant held by Fealty only, or by Fealty and Rent, because if either was true, the Tenant could have no Trespass, *Quare vi & armis*, against the Lord in that Case, by the Statute of *Marlbridge*, Cap. 3. *Vide hic devant*,

After the Verdict recorded, the Jury cannot vary from it, but before it is recorded they may vary from the first Offer of their Verdict. And that Verdict which is recorded shall stand, *1 Inst. 227. Pl. Com. 212.*

There is also a Verdict given in open Court, and a privy Verdict given out of Court, before any of the Judges of the Court, so called, because it ought to be kept secret and privy from each of the Parties, before it be affirmed in Court.

Because the Jury may vary from their private Verdict, as if that find for the Plaintiff, the open Verdict may be for the Defendant, and this shall stand, and the private Verdict shall not be deemed a Verdict; for the Jury are charged openly in Court, and in Court their Verdict ought to be received, and this which they pronounce openly in Court, shall be adjudged their Verdict.

And although it is usual to take the Verdict secretly, when the Jurors are agreed, yet this is not of Necessity of Law, but of Courtesy of Law for the Ease of the Jurors; and in this Case, their Saying shall not be their Verdict till it is openly pronounced in the Court; for when they come in the Court, the Plaintiff shall be demanded, and then may be nonsuited: But when they give their Verdict secretly, the Plaintiff is not demandable, nor can be then nonsuited, but he may be non-

The Jury may vary from a private Verdict.

This was resolved by Dyke L.J. of the C.B. at the Northampton assizes, where the Jury came to the Verdict where the Justice was after the adjournment of the Court, and being asked if they had agreed on the Verdict, said they had & being asked thereupon y: or n: Jurors secretly

gave it upon their Oaths at sight of y: Clerk in y: Court, & after reading it

the Verdict was read to them, & the Jury was asked if they would affirm y: said Verdict, answered they were otherwise agreed upon the matter & gave a different Verdict. It was accepted & recorded after Argument as is above by this Author shown. Plow. Com. 111. 112.

3. 701. They were sent back to y: place from whence they came, & did not appear y: or n: at or through by y: read or by y: next morning the Ct. came together & the Verdict was read to them, & the Jury was asked if they would affirm y: said Verdict, answered they were otherwise agreed upon the matter & gave a different Verdict. It was accepted & recorded after Argument as is above by this Author shown. Plow. Com. 111. 112.

suites, when the Verdict of Right ought to be rendred; *ergo*, the Force is in the giving of the Verdict in the Court, and not elsewhere.

Bro. tit. Ver-

dict, 12.

*it seems that in D. l. 9
Montague's time
Another was brought
in 7. King's Bench for
death of a man & the
Jury gave their verdict
not guilty, & presently
after they said they
had mistaken their
values, & they said
he was guilty and
this last was recei-
ved & entered as
their verdict*

And also in the Court it self, if they pronounce their Verdict, they may change it, if they be mistaken, or if it be not full in Law, or for some other reasonable Cause immediately perceived; therefore if they may vary and contradict their first Verdict given in open Court, *a fortiori* upon better Advise-ment, they may do so when their first Verdict was given out of Court, and they not discharged; for they be in the Custody of the Bailiff, till they be discharged in Court, *Plo. Com. 211. Moor 33.*

Jury shall
give but one
Verdict in
the same
Cause.

Verdict good
in part.

What per-
mitted in
Pleading for
the Juries Di-
rection in
their Verdict.

The Jury having once given their Verdict, although it be imperfect, shall never be sworn again upon the same Issue (unless it be in in Case of Affize, when the Party is to recover by View of the Jurors.) But there must be a *Venire facias de novo*, *Cro. 2 Part, 210.*

If a Verdict be good in Part, and naught in another Part, it shall stand in Part, and a new Inquest shall be for the rest, *Bro. tit. Verdict, 89.*

For the Juries Direction in their Verdict, greater Liberty is permitted in pleading a Matter doubtful in Law; for a Traverse (for this Reason) may be omitted: As in Debt against an Executor, it is a good Plea to say, Administration was committed to him, and therefore he should be named Administrator, and not Executor; without traversing that he is not Executor; for the Lay-People know no Difference, between one administering as Executor, and one administering as Administrator, *9 E. 4 33.*

For

For this Reason likewise the Special Matter may be pleaded together with the General Issue, &c. As that the Obligation put in Suit was sealed by him, and delivered to A. A special Non to keep till certain Indentures were made between the Plaintiff and him, before which Indentures made, the Plaintiff took the Obligation out of the Possession of A. so is not his Deed. This is good, and yet by this general Conclusion, the Matter precedent shall not be waved, for it were perilous to put the Special Matter in the Mouth of Lay-People, 9 H. 6. 38.

* Damages in Trespass, if a Release be pleaded in a foreign County, and tried there for the Plaintiff, there also shall Damages be assessed by the same Jury. For where the Principal is tried, there also shall the Accessary and Incidents be enquired of. I need use no other Instances to illustrate this, than the Case above said. *21 Aff. 14.*

They may find a Condition to defeat a Freehold of Land, although it be not pleaded; but of Things in Grant, they must also find the Deed of the Condition.

Upon Traverse of a Lease *Modo & forma*, *Modo & forma*, the Jury may find a Lease of another Date, although the Date be mistaken in the Pleading, but not a Lease made by another, than from whom was pleaded; for this is out of the Issue in Matter and Form.

In an Assize of Rent, the Jury may find that the Rent was granted with an Attornment, although no Specialty be shewed.

A Fine or Recovery may be found by the Jury, without shewing of it under Seal. The Jury cannot find against what is admitted by the Record, *Siderfin 271.*

- Record.** If the Verdict be contrary to a Matter of Record, it may be set aside as naught.
- Inspection.** If a Party be found by Inspection to be within Age, the Verdict that finds him of Age shall be holden for none.
- Jeofail.** A Verdict finding Matter against the Record is a *Jeofail*, 11 H. 6. 42.
- Divorce.** They may find a Divorce, which is a Record in the Spiritual Court, but not by our Law.
- Attainder.** The Verdict found an Attainder of Felony not pleaded, nor given in Evidence *sub pede sigilli*, 26 Aff. 2. and the Court took it ill.
So if a Fine and Recovery were found not pleaded, nor given in Evidence *sub pede sigilli*, 26 Aff. 5.
The Jury is not to inquire of this which is agreed by the Parties.
- Dower.** As in Dower, if the Tenant says he has been always ready to render Dower, and the Issue be if the Husband died seized, the Jury is not to inquire if the Estate was dowable, for this is confessed.
- Waste.** If the Defendant doth not deny the Waste, but pleads another Matter, *scilicet, nul tiel vill lou, &c.* The Jury is not to inquire of the Waste, but give Damages although no Waste be made.
- Award.** In Debt upon a Bond, with a Condition to perform an Award, and the Defendant plead *nullum fecit Arbitrium*, and the Plaintiff reply, *fecit Arbitrium*, and sets it forth, and the Defendant rejoin *Nul tiel Award*, the Jury cannot find any Matter *Dehors* to make the Award void in Law, which doth not appear within the Award pleaded; as that the Release awarded would discharge the Bond of the Submission; for nothing is in Issue, but whether

whether such an Award was made *in fait*, as is alledged, neither could this Matter be alledged by any Rejoinder; for it would have been a Departure from the Plea, and a Jury cannot find that which would have been a Departure, because out of their Issue. But in this Case, if the Defendant would have took Advantage of it, he ought to have pleaded all this Matter in his Bar, and not have said *nullum fecit Arbitrium*; for 'tis a Departure in the Rejoinder, to acknowledge an Award which was denied in the Plea.

In Debt for twenty Shillings, and the Issue be, *solvit ad diem*, and the Verdict be *quod debet* the twenty Shillings, this is not good, because it is not direct but by Argument. How the Jury ought to find their Verdict, and what shall be intended.

In Debt upon an Obligation, if the Defendant say, That he is a Lay-Man, not lettered, and 'twas read as an Acquittance, & *Nient* lettered. *issint nient son fait*, if the Jury find he knew what he did, and that it was a Bond, and he was willing to be bound, this is no good Verdict, because they ought precisely to find if it was his Deed or not.

If the Issue be, whether where a Copyhold is granted to three for the Lives of two, if he which die seized, &c. ought by Custom to pay an Heriot or not, and the Jury find that there was never any such Estate granted in the Mannor, this is not good for the Reasons aforesaid. Custom.

So if the Issue be, if by Custom an Estate Tail may be granted, and the Jury find that it may be granted in Fee, which is greater, yet 'tis not good.

In Trespass for taking and cutting his Lea-
ther, if the Defendant justify as a Searcher;
and cut it for the better Search *More Scrutato-*

rum, without any other Damage; and the Plaintiff reply, *De injuria sua propria absque hoc*, that he cut it *More Scrutatorum*, upon which Traverse Issue is joined, and the Jury find that the Defendant cut it as the Plaintiff has alledged; this is no good Verdict, because 'tis not any Answer to the Issue but by Argument

Battery.

In Trespass and Battery in *A.* to find Not guilty in *A.* is not good; for it ought to be generally Not guilty.

Ricus per descent.

Upon this Plea, if the Plaintiff reply, That he hath divers Lands in *D. per Descent*, and the Jury find he had divers Lands by *Descent*, this is good, without finding what; for 'tis not material, in regard upon this false Plea a general Judgment, is to be without having respect to the Assets.

Uncertain.

Of five Acres, if they find the Defendant guilty in eight Pieces, *de terra parcel tenementorum predict'*, 'tis a void Verdict because uncertain, and no Execution can be made of Pieces.

Ejectment.
Manor.

In Ejectment of a Manor, on *Non culp.* the Verdict was for the Plaintiff for the Manor, and *Quoad servitia non culp.* 'Twas objected, That the Verdict was not for the Plaintiff for the Manor, because as to the Services 'twas for the Defendant; but 'twas answered the last Part as to the Services was void and Surplusage, *Siderfin* 232. *Keble* 1 Part, 810.

Verdict special.

In Case upon *Non assumpsit* pleaded, if the Jury find that the Defendant *Non assumpsit*; yet if two Witnesses say true, then we find that he did assume. The first shall stand for the Defendant, and the last Words are void; and Surplusage shall not vitiate.

Surplusage.

If upon a Lease of twenty Acres and the Ejectment Jury find *quod dimisit ten Acres tantum*, and the Conclusion of the Verdict is, *Et si super totam materiam Curiae videbitur quod Defendens dimisit* twenty Acres, then they find for the Plaintiff; and if not, then for the Defendant; this is repugnant, and so the Verdict is void in all.

In Ejectione firmæ de 7 Messuagiis sive Tenementis, and Verdict *pro Querente*. 'Tis ill for the Incertainty, and the Verdict doth not help it; and *Hale* refused to let the Jury find for the Plaintiff, for the Messuages, and *Non Culp.* for the Tenements: but by *Twisden*, if it had been *de uno Messuagio sive Tenemento vocato*, the *Black Swan*, it had been good, because the last Part makes it certain, *Siderfin* 295. *Keble* 2 Part, 80. *Cro.* 3 Part, 186.

To assess Damages incertainly, is void; as Certain. to say we assess forty Pounds, if we must by Law, if not, then but three Pounds, this is void.

Indebitatus assumpsit, to assess Damages, *occasione debiti prædicti*, is good, although it ought to be *occasione non performanceis*, &c. Damages.

In an Information upon the Statute 39 *Eliz.* Information. cap. 11. for dying with Logwood, by which he lost twenty Pounds for every Offence; upon Not guilty, if the Jury find him guilty for using this against the Statute for forty Days, by which he lost this is not good, because he forfeits twenty Pounds for every Time, and the Number of Times do not appear.

If the Jury find the Words in the Will, and yet do not find the Will, the Verdict is not good.

If they first find the Special Matter, and then find the Issue generally, the Special Matter is hereby waved.

Where a Special Verdict shall be good by Intendment.

If the Jury find that *J. S.* was seized in Fee, and devised the Land to *J. D.* although they do not find that the Land was held in Socage, yet this is good, for this shall be intended, this being a collateral Thing, and this being the most common Tenure.

Devastavit.

Verdict of Eloynment and Conversion to his own Uses proves a *Devastavit*, *Keble 2 Part, 488.*

Will.

If they find that he was seized and made his Will *in hac verba, &c.* although they do not find that he devised the Land as in the former; yet this is good by Intendment.

But if a Thing is left out, and cannot be intended, the Verdict is not good.

If the Issue be, whether the Sheriff took *J. S.* and kept him in Prison in Execution for certain Debt and Damages by Force of a *Capias ad satisfaciendum*, and the Jury find that he took him by Force of an *alias Capias ad satisfaciendum, &c.* although they do not find that he kept him in Execution for the Debt and Damages aforesaid, according to the Issue; yet this is a good Special Verdict; for it shall be intended; for the Consequence is necessary from this which is found, for he could not take him, but that he must be in Execution: *Vide* several Instances of this, *Roll. tit. Trial, 697. &c.*

Will.

If the Jury find that *J. S.* was seized in Fee, and made his Will *in hac verba*, and that he afterwards died; although they do not find that he died seized, yet it shall be intended that he died seized, and so good.

If

If they find that *A.* did bargain and sell, &c. Bargain and although they do not find any Consideration, Sale. yet this shall be intended.

So if they find that such Persons *Authorizati* Letters Pa-
virtute literarum patentium Domine Elizabethæ, &c. tents.
and do not find that the Letters Patents were
under the Great Seal, yet this shall be in-
tended.

Verdicts of Lay-Men shall be taken accor- Intent.
ding to their Intent, and need not so precise
a Form as in Pleadings, *Lib. 4. 65. Hob. 76.*
Siderfin 27, 75. Littleton's Reports 133, &c.

Therefore if the Jury find a Recognizance
in Nature of a Statute Staple in this Manner,
That the Conusor came before R. O. Recor-
der of *London*, and T. O. Mayor of the Staple,
& *recognovit se debere to B. 200 l.* and do not
say, *secundum formam Statuti, &c.* nor *per scriptum*
Obligatorium, &c. altho' the Statute of 23 H. 8.
provide, That it shall be by Bill Obligatory,
sealed with three Seals; and here it doth not
appear, that there was any Bond or Seal, nor
that it was according to the Statute; yet
these Things shall be intended, they having
found a Recognizance before the Mayor and
Recorder.

A Special Verdict may be amended by the Notes.
Notes. *Keeble 1 Part, 907.* see a Coroner's
Inquisition amended by his Notes.

If the Jury find a Special Verdict, and re- Where a Spe-
fer the Law upon that Special Matter to the cial Concln-
Court, although they do not find any Title sion of a Spe-
for the Defendant, which is a collateral Thing cial Verdict
to the Point which they refer to the Court, shall aid the
yet the Verdict is good enough, for all other Imperfections
Things shall be intended, except this which is
referred to the Court, *Lib. 5. 97. Littleton's*
Rep. 135, &c. Keble's 2 Part, 362, 412.

In

In Ejectment, if the Plaintiff declare upon a Lease made by A. and the Jury find a Special Verdict, and Matter in Law upon a Power of Revocation of Uses by an Indenture and Limitation of new Uses, and then a Lease for Years made to the Plaintiff by the Lessor in the Declaration, and another, in which there is an apparent Variance; but they conclude the Verdict, and refer to the Court, whether the Grant of a new Estate found in the Verdict, be a Revocation of the first Indenture, or not. The Special Conclusion shall aid the Verdict, so that the Court cannot take Notice of the Variance between the Lease in the Declaration and Verdict, because the Doubt touching the Revocation, is only referred to the Court. And although they refer to the Court, whether this be a Revocation of the first Indenture, and not of the former Uses, and Limitation of new Uses, as it ought to be; yet in a Verdict this is good, for their Intention appears.

So *Note*, A Difference between a Special Conclusion and Reference to the Court, and a general Conclusion, and Reference to the Court, *vide hoc postea*.

For whom
the Verdict
shall be said
to be found.

In Debt for forty Shillings for a Horse, sold, and the Jury find forty Shillings Debt, for two Horses sold; this is found against the Plaintiff, for this is not the same Contract.

So in Debt, twenty Pounds, if the Jury find forty Pounds Debt, this is against the Plaintiff.

In Debt for twenty Pounds for Wood sold, and the Jury find the Bargain was for twenty Marks; the Plaintiff shall not have Judgment for this Variance.

So in Debt for Rent upon a Demise of two Acres, and the Jury find it upon the Demise of one Acre, the Plaintiff shall have Judgment.

But in Debt for twenty-four Pounds eight Shillings, received for the Plaintiff's Use, if the Jury find the Defendant owes twenty-four Pounds, but not the eight Shillings, the Plaintiff shall have Judgment : For perhaps he had paid the eight Shillings.

In an Action upon the Case against *A.* if the Plaintiff declares, That by Custom, &c. amongst Merchants, &c. If two are found in Arrearages upon Accompt, and they assume to pay this at certain Days, that any one of them may be charged for the whole by himself, and then shews the Accompt of *A.* and *B.* who are found in Arrear, insomuch, &c. And promised to pay this at certain Days, but paid it not, and now he brings his Action against *A.* although upon *Non assumpsit* pleaded, it be found that the Days of Payment are mistaken, yet the Days being past the Action lies, because the Law makes the Duty upon the Accompt ; for which after the Days an Action lies.

In Debt upon a Lease of twenty Acres, the Defendant pleaded the Lease was of twenty-four Acres, *sans ceo que il demise les 20 Acres tantum.* The Verdict found the Demise of twenty-one Acres only ; 'twas looked upon as a *Feofail* and found for neither Plaintiff nor Defendant, *Dyer* 32.

If the Issue be *Assets in Sale*, and the Verdict be *Assets in Dale*, 'tis a good Verdict, for the Place is not material, *Keble* 1 Part, 662.

So of an Accompt before *A.* and *B.* An Accompt found before *A. tantum* is good.

In

In Escape of Baron and Feme, and the Jury find of the Baron only, 'tis good, and so in other Actions grounded upon a *Tort* to find Part. But upon a Contract the Verdict ought to pursue the Declaration, otherwise in Debt upon a Lease for Years, for Rent, *Siderf.* 5, 6. *Keeble* 1 Part, 371.

Issue whether Money was paid for *Blackacre*. Verdict, that it was paid for *Blackacre* and *Whiteacre*, good: So *per Twifden*, whether a Common was from *Lady-day* to *Michaelmas*, and the Verdict finds from *Christmas* to *Michaelmas-day*, 'tis good, *Keble* 1 Part, 192.

Indictment of forcible Entry and Detainer, a Verdict of forcible Entry and forcible Detainer, is sufficient to grant Restitution upon, *Keeble* 1 Part, 419.

Barwel prayed Bill of forcible Entry and Detainer, found *Ignoramus* as to the Detainer, and *Billa Vers* as to the Entry, might be quashed, which was done; for the Offence as charged being intire, the Grand Jury cannot apportion their Verdict as the *Petit Jury* on Indictment may, *Keeble*, 1 Part, 931.

Damages.

Where all is to be given in Damages, the Jury are Chancellors, and may give so much as the Case requires in Equity.

Detinue.

In Detinue of a Bond of 100*l.* if the Jury find that he received a Bond of a greater or less Sum, the Verdict is for the Defendant.

Promise.

So in a Promise to do two Things, if the Jury find but one of them, 'tis for the Defendant.

Ejectment.

Otherwise in Ejectment upon a Demise of ten Acres, if the Jury find a Demise of less, the Plaintiff shall have Judgment.

If

If the Issue be upon a Prescription for Common belonging to a Messuage, and two hundred Acres of Land, fifty of Meadow, and fifty of Pasture; if the Jury find Common belonging to the House, twenty Acres of Meadow, and twenty of Pasture in two of the Vills, and not in the rest, the Prescription is not found. Prescription.
Vide Devant.

If part of the Trespass or Wrong be found 'tis sufficient in Trespass, or an Action of the Case upon a Tort; as by a Commoner, for putting and depasturing Cattel in the Common.

If the Issue be whether all the Lands in Execution, were the Estate of the Father in Tail, or in Fee, and part is found in Tail, and part in Fee; Judgment shall be given for the Defendant, who pleaded the Seisin in Fee. *Audita Que-
rela.*

If the Plaintiff declares upon a Demise made the first of May, to commence at Michaelmas next, if the Jury find a Lease made at any other Day before the Feast, 'tis found for the Plaintiff; for the Day of making is not material.

Otherwise of a Lease for Years in Possession; as of a Lease made the fifth of May, Habend. for three Years, from Lady-day before; and the Jury find a Lease made the 15th Day of May, for three Years, from the same Lady-day; for this is a Lease in Possession.

In false Imprisonment in Middlesex, and the Defendant justifies in London, to which the Plaintiff saith, the Defendant took him in Middlesex, *de son Tort demesn.* and Issue upon this, and the Jury find the Defendant took him in Middlesex lawfully, upon a Writ, yet this is for the Plaintiff; for the Issue is upon the Place, and not upon the Tort, for that is confessed Imprison-
ment.

fessed by the Pleading, if the taking was in *Middlesex*.

Debt.

In Debt for twenty Pound, and the Jury find forty Pound, the Plaintiff shall not have Judgment; the Reason seems to be, because it cannot be the same Debt, which is intire; but upon another Contract, which is mis-laid.

Audita Querela.

If the Issue be Payment after Execution, and the Jury find Payment before, yet the Issue is proved; for Payment before is Payment after.

Obligation.

In Debt upon a Bond, bearing Date the 25th of *June*, upon *Non est factum*, if the Jury find it his Deed, but that it was delivered eight Days after the Date, this is found for the Plaintiff.

Joint and several.

If the Issue be, that two made the Feoffment, or two were Church-wardens, &c. and the Jury find but one, &c. the Issue is not found.

Obligation.
Covenant.
Waste.

If the Breach of Covenant or Waste be assigned in cutting twenty Trees, and the Jury find but ten, yet the Plaintiff shall have Judgment.

Totum & Pars.

If in *Replevin*, &c. the Jury find that part of the Cattle were Levant and Couchant, and part not, and the Issue is upon all, the Issue is not found.

In Debt, *tam quam*, on the Statute 1 *Jac. cap. 22.* for cutting Oaks unseasonably, on Not guilty, and Verdict for the Plaintiff, 'twas excepted in Arrest of Judgment, That the Jury found the Value of each Tree, six Shillings eight Pence, but do not cast up the Sum. *Sed per Curiam*, In this Issue 'tis needless; but had the Issue been *Nil debet*, they must cast it up, and not leave it to the Court, *Keble*, 1 Part, 835.

Kelynge excepted to an Indictment of Assault, Battery, and Wounding. The Jury find him Not guilty *de transgres. & insult. præd. Sed per Cur.* 'Tis well enough, and comprehends the whole, *contra* if it had been *de insult. præd.* only, and the Presentment, Traverse and Trial was all at the same Day and Sessions, *ex assensu*, being a Favour to the Party, *Keble*, 1 Part, 879.

In Ejectment for him who pleaded all of Ejectment fourteen Acres, and the Jury find Guilty of Void in part, twenty, the Plaintiff shall have Judgment for the fourteen, and the Verdict is void for the Residue.

In an Information upon an usurious Contract by two, 'tis not sufficient to find a Contract by one. Otherwise where the Tort and Offence is several, as against two upon the Statute 4 E. 6. *Pro emptione butiri*, and selling it by Retail, &c. and so in an Action upon the Case in Nature of Conspiracy, and for Words laid twice in one Declaration. This will put in Issue the Manner as well as the Matter, where the Matter is material; as the Time of the Fact and other Circumstances.

The Plaintiff replies, that *W.* made a Lease to him 30 *Martii*, *Habend.* from Lady-day last, and Issue *Modo & forma*, and the Jury find a Lease made 25 *Martii*, *Habendum extunc* for a Year, this is good, although the Time of making and Commencement of the Lease are mistaken, inasmuch as *extunc* includes the Feast. Yet because a sufficient Title and Lease is found for the Plaintiff to put in his Cattel, this is sufficient, this being the Substance, and the *Modo & forma* shall not put the Circumstances in Issue.

So

So in Trespass, if the Defendant justify the putting in his Cattel for Common, which he claims from *Pentecost* to a certain Time every Year, which is traversed *Modo & forma*, and the Jury find that he had Common *in Vigilia Pentecostis in festo*, and the Day next to this to the Time, this is found for the Defendant.

But otherwise in these Cases in an Assise of Common, because there he ought to recover his Title.

In Debt for Rent, if the Defendant plead an Entry by the Plaintiff, before the Rent was due, *scilicet* such a Day, which was after, and Issue upon the Entry *Modo & forma*, and the Jury find for the Defendant, he shall have Judgment, for the *scilicet* is void, and the *Modo & forma* go to the Matter. See after.

Non est factum. In Debt upon a Bond, and the Defendant plead *Non est factum*, and the Jury find the Bond made jointly by another with the Defendant, the Plaintiff shall have Judgment; for the Defendant should have pleaded this.

Devise. If a Devise be pleaded absolute, if the Jury find a Devise upon a Condition precedent, 'tis not good.

Riens per Discent. In Debt against *A.* as Daughter and Heir to *B.* and the Defendant plead *Riens per Discent* of *B.* and the Jury find that *B.* was seized in Fee, and died, having Issue the Defendant his Daughter, and his Wife with Child of a Boy, who was afterwards born alive, and died one Hour after, this Issue is found against the Plaintiff, because the Defendant had the Land as Heir to her Brother, who was last seized, and not to the Father, and so

the Defendant had not the Land by Discent from the Father, but from the Brother, yet this is Assets in her Hands if it had been specially pleaded.

In a Writ of Error brought by him in Remainder in Tail to reverse a Fine, if the Defendant plead in Bar of the Writ of Error, a Common Recovery by the Tenant in Tail; to which the Plaintiff replies, That at the Time of the Recovery suffered, he himself was Tenant to the *Præcipe*, and so the Recovery void, upon which Issue is joined, and the Jury find that he was Tenant of Part, but not of other Part. This Issue is partly found Part. for the Plaintiff, and partly for the Defendant, so the Court shall proceed to the Examination of the Error, for that whereof he was found no Tenant; but 'tis a good Bar of the Writ of Error, for that whereof he is found Tenant to the *Præcipe*.

In *Assumpsit* to pay Money upon Request, Promise. and Issue upon this, if the Jury find the Plaintiff promised to pay the Money, but do not say upon Request, nor *Modo & forma*, 'tis not found for the Plaintiff.

In Ejectment of a Manor, if the Jury find that there were no Freeholders, and so 'tis no Manor in Law, yet being a Manor by Reputation, and so the Tenements pass by the Lease; therefore this Verdict is found for him who pleads the Lease of the Manor, for the Substance is, Whether any Thing was demised or not? If the Substance of the Issue be found 'tis sufficient. Manor.

In an Information of Extortion against the Gaoler of the Gaol, a Prison of the Castle of Gaol. *Maidstone*; the Jury found there was no Castle, but that there was a Gaol, this was for the Plaintiff, because Gaol is the Substance.

T

If

Accompt.

If the Issue be, Whether the Defendant had accompted before R. and W. Auditors assigned by the Plaintiff, and the Jury find an Accompt before R. only, the Issue is found for the Defendant; for the Accompt is the Effect of the Issue. *Vide Roll. tit. Trial, 707, &c.*

Jury agree.

If eleven agree, and the twelfth will not, the Verdict of the eleven cannot be taken, but the Court may carry the Jurors with them in Carts until they are agreed, 41 Aff. 11.

Verdict altered.

A privy Verdict may be altered in open Court.

In an *Extendi fac.* upon a Statute, if the Jury deliver their Verdict in Writing, they may afterwards make it more formal, but they cannot alter it in Substance, for it is a compleat Verdict by the Delivery. So of Presentments, &c.

Fine and Non-claim.

A Fine pleaded in Bar, and that after the Death of A. *scil. 1 August, 3 Car. B. Father of the Plaintiff, was alive, & in plena vita & remansit infra hoc Regnum infra quatuor Maria, &c. apud W. in Com. D. and no Entry or Claim within five Years after, and the Plaintiff replies and takes Issue, Que il non fuit & remansit infra hoc Regnum Angliæ modo & forma, &c. And the Jury find Quod non fuit & remansit infra hoc Regnum Angliæ, 1 August, 3 Car. but that he was there 1 Maii, 4 Car. and remained there a Month, and refer to the Court,*

Modo & forma. An fuit & remansit infra hoc Regnum modo & forma, &c. This Issue is found for the Defendant, for the Matter and Substance of the Plea is, Whether he was within the Realm after the Death of A. and five Years before Entry or Claim per him or the Plaintiff, and modo &c.

& *forma* shall not make the Day material,
Roll. tit. Trial, 713.

Judgment upon a Demurrer, and a Writ of Judgment, Inquiry executed at the Return, the Party ^{Arrest, at} may shew any Thing in Arrest of Judgment; ^{what Time.} for Judgment is not compleat until the last Judgment. The first is but an Award: A Man may plead any Thing in Arrest of Judgment after a Verdict, which will make Error if the Judgment be given.

In Debt upon a simple Contract against an Executor, if he will not plead in Abatement, but other Matter which is found against him, he shall not afterwards alledge that he is not chargeable in Arrest of Judgment.

So in Debt against Executors upon Arrearages of Accompt, where they are not chargeable.

That which appears ill upon the same Record, but not a Matter of Fact, which doth ^{What may be} not appear upon the Record, because the Parties cannot try the Issue. As that a Juror was challenged, and yet served on the *Tales*, for this cannot appear without alledging Matter of Fact. Nor that the Defendant's Attorney had no Warrant. But if there be any irregular or foul Practice, this may be offered to set aside a Judgment. ^{alledged.}

In Error upon Judgment in *Durham*, in *Visne*. Debt upon Bond to pay twenty Pounds; the Defendant pleaded *solvit ad diem*, not saying where; a Verdict thereupon is void, because there is no *Visne*, and so no Trial, *Keble*, 2 Part, 620.

If any Thing be omitted in the Declaration, or if more is put in the Declaration than ^{Variance between the} is found by the Jury, if it makes a material ^{Verdict and} ^{the Declaration} Variation. T 2

Variance betwixt the Nar. and the Verdict, the Action shall abate.

These following are adjudged material Variances.

Words.

If the Declaration be for these Words, *Thou procuredst eight or ten of thy Neighbours to perjure themselves*, and the Jury find that he said, *Thou hast caused eight or ten, &c.* for he might be a remote Cause, *scilicet causa sine qua non*, without Procurement. Nar. *He is a Bankrupt.* Ver. *He will be a Bankrupt within two Days.* Nar. *He is a Thief.* Ver. *He stole a Horse.* Nar. *Thou art a Murderer.* Ver. *He is, &c.* Nar. *I know him to be a Thief.* Ver. *I think him to be a Thief.*

Promise.

So it is material Variance, if a special Promise be laid to be upon Request, and the Verdict find it without Request. So if the Declaration be upon a Lease made by two, or by Baron and Feme, and the Jury find that one of them had nothing in the Land, or that the Baron only made the Lease, or that the two were Tenants in Common, and so several Leases; otherwise if they were Co-partners.

So in Case that the Testator was indebted to the Plaintiff in fifty-five Pounds, and the Defendant being Administrator *in consideratione*, &c. promise to pay this; upon *Non Assumpsit*, if the Verdict find the Promise to be to pay thirty Pounds, part of the fifty-five Pounds.

Ejectment.

So in Ejectment, if the Nar. be of a Lease of three Acres, a Lease of a Moiety will not maintain the Nar.

Waste.

So in Waste, for cutting Trees, and the Verdict find that he eradicated the Trees, but did not cut them.

A Prescription *in modo decimandi*, That every one who hath seven Lambs, or under seven, shall pay to the Parson *ob.* for every Lamb, and the Jury find that; and farther, That if he had more than seven Lambs, he should pay a Lamb; and that the Parson should pay the Parishioner *ob.* This is not the same Prescription, but makes a Variance.

But if there be a Variance between the Verdict and the Nar. either by Way of Surplus or Defect; but if this Matter of Variance be not material in the Extenuation of the Action or Damages, the Action shall lie notwithstanding the Variance.

These ensuing are adjudged not to be material.

Nar. *Strong Thief.* Verdict, *Thief.* Nar. *I say, &c.* Ver. *I affirm, or I doubt not.* Nar. *The Plaintiff will do such a Thing.* Ver. *I think in my Conscience he will, &c.* Nar. Of a Lease by a Parson for five Years; if he *tam diu* should be Parson, & *tam diu viveret.* And the Ver. find the Lease to be for five Years, if he *tam diu viveret* without the Words, and should continue Parson; for the Law implieth, That if he be deprived or resign, that the Lease determines. Nar. *He is a Murderer.* Ver. *He was a Murderer;* for when he says, *He is a Murderer,* 'tis not intended, that he did the Act *in præfenti*, but before. So in Trespasses or Actions upon *Torts* and Wrongs which are several, If the Verdict find part 'tis no material Variance; and the Plaintiff in these Cases shall have Judgment, *Roll. tit. Trial, 722.*

A Jury of *Middlesex* was demanded in the Inquest by *Common Pleas*, the first Day of the Term, and Default.

some appeared, and some not, so that here was not a full Jury, and neither the Defendant nor his Attorney did appear, and therefore the Plaintiff prayed, that the Inquest might be awarded by Default; and by the Opinion of *Welsh* and *Dyer*, his Prayer shall be granted, and the *Custos Brevium*, and all the Prothonotaries said the Course was so, for the Parties are demandable before the Jury, and if the Plaintiff make Default, he shall be nonsuited; and if the Defendant make Default, the Jury shall be awarded by Default, whether they appear or not, *Dyer* 265.

What the Defendant loses by his Default.

Where an Inquest is taken by Default, the Defendant shall lose his Challenges, and by 28 *Aff. p.* 42. tit. *Enquest* in *Fitz*, he shall lose his Evidences also, *Bro. Enquest* 10. *quod non est lex.*

When the Defendant may be condemned by Default, and when an Inquest must be taken upon the Default.

Det. The Defendant pleaded a Release, and the Plaintiff replied *Non est factum*, and at the Day of the *Venire facias* the Defendant made Default, and the Inquest was taken upon his Default, and found for the Defendant, for which the Plaintiff took nothing by his Bill; and yet if the Plaintiff had prayed it, he might have had the Defendant condemned by his Default before the taking of the Verdict. *Et sic vide folly in le Plaintiff, Bro. lb. 5.* But upon such Release and Default in Trespass, the Inquest shall be taken by Default, and the Defendant shall not be condemned by Default, though the Plaintiff pray it, and the Reason is, because the Debt is certain, and the Damages are incertain in Trespass, *Bro. Ibid. 3.*

And

And *Finch*, fol. 409. hath well collected out of *Brook*, That always in an Action of Trespafs, whatsoever the Issue be, Release, Justification, &c. and also in Debt, Detinue, Account, and the rest which are for Things in Certainty, if the Issue be taken upon a Matter in *fact* only, as Payment, or that an Acquittance pleaded in Bar by the Defendant was made by *Dures*, &c. The Inquest shall be taken by Default, if the Defendant makes Default; but in the last recited Actions of Debt, &c. if the Issue be upon the Acquittance it self, Release, or other Matter in Writing, the Plaintiff may pray Judgment upon the Defendant's Default, if he will; but if he do not pray it, the Jury shall be taken by Default, as in an Action of Trespafs.

The Jury may give a Verdict without Testimony, or against Testimony, when they themselves have Conusance of the Fact, *Plow. Com.* 86.

Verdict without, or against Testimony.

The Jury are to find Costs and Damages in Debt, Trespafs, Ejectment, Nuisance, Covenant, &c. Debt for Tithes, treble Value of the Tithes, and no Costs nor Damages.

In *Audita Querela sur Statute*, the Issue and Value of the Land.

Waste, Treble Damages.

Quare Impedit. 1. Whether the Church was void by the Death of the Incumbent? 2. Whether it be now full, or not? If it be full, at whose Presentation? And if six Months be past since the last Avoidance? And of what Value it is by the Year? And what Costs and Damages?

The Verdict. In Dower, *Inquiratur si vir obierit seizitus de tenementis prædict. in dominico suo ut de feodo, aut de feodo talliat. Et si ita invenerint, tunc quantum tenementa illa valent per annum in omnibus exitibus ultra reprisas, juxta verum valorem eorund. & quantum tempus dilabitur a tempore mortis præd. viri, & quæ dampna petens sustinet tam occasione detentionis dotis quam præmissorum.*

En Dower, Nota. The Jury finding the dying seized, they must assess Costs and Damages, but if they find the Husband was seized, but did not die so, then no Costs nor Damages, but only the Value of the Land.

In Detinue, Si pro quer. de valore rei detent. & custag. & dampna.

In Replevin, Damages for both Parties and Costs.

In Account, No Damages nor Costs.

In placito terræ. Nulla dampna nec custag. Warrantia Chartæ Consimile.

Assise Consimile.

Prohibition, Si pro quer. tum enquir. de exitibus & non plus.

Partitione facienda, Si pro quer. tunc de exitibus & non plus

En brief de Entry in le per. Custag. & dampna.

In all real Actions generally no more than the Issue.

In Replevin, If the Plaintiff be called and do not appear, the Court takes the Verdict for the Defendant, and the Jury assess Damages and Costs. But Nota, That a Verdict is not usually taken in other Actions after the Plaintiff is Nonsuit. Siderfin, 2 Part, 155.

Redwood versus *Coward*. *Hill*. 8 *W.* 3. *B. R.* *Affident damna*, well in a Verdict.
Intr. Trin. 8. *W.* 3. *Rot.* 645. A Verdict was entered *affident damna* for *assident*, and on a Writ of Error this was assigned for Error, and insisted was future. *Sed non allocatur*; For it may be the present Tense of the Word *Affideo*; however, in Verdicts the same Exactness of Expression is not required as in Pleading, for they are the Words of a Lay Jury, and tho' it may not be proper *Latin*, yet it is so common, that it is now made good by Prescription. *Vide Plo.* 347. 3 *Cro.* 647. 4 *Co.* 7. And the Court said, it was not like *Concessum* instead of *Consideratum est* in a Judgment, for that those Words were of different Import, and the Law requires that judicial Acts should appear to be done upon Consideration, *Sal-keld* 328.

Crouther versus *Oldfeild*. *Hill*. 4 *Ann.* *B. R.* Copyhold Estate laid without saying, *ad voluntatem domini*, and held well after Verdict, because the Lands alledg'd to be Parcel of the Manor.
 The Plaintiff declared 'quod cum seifitus
 'fuiſſet de uno Meſſuagio & decem acris ter-
 'ræ in N. parcell. Manerii de W. ac tent. per
 'copiam rotulor. Cur. Manerii illius ut tenens
 'cuſtumarius in feodo ſimplici ſecund. con-
 'ſuetudinem Manerii; cumque ipſe præſat.
 'quer. habeat & habere debeat, ipſeque &
 'omnes tenentes cuſtumarii Manerii prædict.
 'per conſuetud. infra Manerium ill. a tempore
 'cujus, &c. Habuer. & habere debuerunt &
 'conſueverunt communiam Paſturæ in quo-
 'dam loco vocat. Waimles Moor parcell.
 'dicti Manerii pro omnibus averiis communi-
 'calibus ſuper tenementa ſua cuſtumaria le-
 'van. & cuban. tanquam ad tenementa ſua
 'prædict. ſpectan & pertinen. prædict. tamen
 'defendens, to deprive him of his ſaid Com-
 mon, had incloſed, per quod, &c. Upon Not
 guilty

In pleading Copyhold it is sufficient to shew the Grant of the Lord; in customary Freeholds the Estate of the Surrenderor must be shewn.

Verdict will not aid a bad Title when shewn, tho' it need not have been shewn.

guilty pleaded, the Plaintiff had a Verdict; but upon Motion in the *Common Pleas*, Judgment was arrested. Upon this the Plaintiff brought a Writ of Error in *B. R.* and that Judgment was reversed: 1st, It was agreed in this Case, that a Man cannot be a Copyholder, nor an Estate be a Copyhold Estate, tho' it be held *per Copiam Rotulorum & secundum consuetudinem Manerii*, unless it be also *ad voluntatem Domini*; and the Chief Justice said, the great Difference between Copyholds and customary Freeholds which pass by Surrender is, That the Copyholder is in by Demise from the Lord; but in the Case of customary Freeholds the Lord is only an Instrument; and that in pleading a Title to a Copyhold Estate, it is sufficient to shew a Grant from the Lord; but in the other Case it is not enough to shew, that the Lord granted it, or that *A.* surrendered to the Lord, and he granted; but it must be shewn that the Surrenderor was seized in Fee and surrendered to the Lord, and he granted, &c. 2dly, It was agreed, That if this Estate must be taken to be Freehold, the Judgment of the *Common Pleas* was rightly given: For then the Plaintiff being seized of a Freehold Estate, to make a Title to the Common, should have prescribed, that he, and all those whose Estate he had, have Time out of Mind had, &c. and cannot make a Title by Custom, according to 1 *Cro.* 418. And here the Court admitted the Case of *Dorne and Cashford*, and said, That tho' the Plaintiff in possessory Actions may declare upon his Possession without setting out a Title; yet if he undertakes to set out a Title, and shews a bad one, the Verdict cannot cure that. *Vide* 1 *Cro.* 418.

418. 2 Cro. 315. 2 Saund. 136, 186. 1 Mod. 294. But the Court held, That now after Verdict this Estate of the Plaintiff must be taken to be a Copyhold Estate, and not a Freehold Estate, because it is both laid and found, that the Tenements were Parcel of the Manor, and that by Custom, the Plaintiff *ut tenens customar.* has Common; all which is utterly impossible, unless the Tenement was Copyhold, and therefore must be supposed such, tho' the Words *ad voluntatem Domini* were omitted, comparing it to the Case of Debt for Rent by an Assignee of a Reversion, who shews no Attornment and has a Verdict, and the Case in 1 Sid. 218. Upon this Foot the whole Court held, That tho' a Title, which could not be good, could never be aided by a Verdict; yet a Title in a Declaration which was only imperfectly set forth, and where the Want of somewhat omitted might be supplied by Intendment, was cured by Verdict: And hereupon, supposing this to be a Copyhold Estate, there arose these Objections: 1st, That the Custom was not alledged expressly, *quod infra manerium prædict. talis habetur & a tempore, &c.* but *quod cum ipse per consuetudinem habere debeat*, which does not affirm a Custom, but suppose it. *Vide* 4 Co. 31. b. *Vaugh.* 251, 253. 2 Cro. 185. Co. Ent. 123. b. *Rast.* 627. 2dly, That they ought not to claim Common *tanquam ad tenementa sua spectan. & pertinent.* for it is annexed to the Estate and not to the Land; the Reason is, because the Estate grew by Custom, and so did the Common as part thereof, or rather a Privilege annexed thereto. *Vide* 2 Cro. 253. 2 Brownl. Entr. 96. If a Copyholder purchase the

Verdict aids a Title defectively set forth, not a bad one.

Diversity between Common belonging to the Estate, and to the Land.

the Freehold of his Copyhold, his Common is gone. As to the first Objection the Court held, that it was but a defective Title, and there was Room enough to induce a Proof of the Custom; and it was only an Informality of laying the Custom, which is cured by the Verdict. As to the second Objection the Chief Justice took this Difference, viz. Where a Copyholder claims Common in the Wastes of a Manor, it properly and strictly belongs to his Estate; and if he enfranchise his Copyhold, in that case his Common is lost; but where he claims it out of the Manor, it belongs to the Land and not to the Estate; and if he enfranchise the Estate, the Common continues: But all the Precedents of Common are, *tanquam ad tenementa sua spectan.* 9 Co. 113. Co. Ent. 9. Dy. 363. b. 1 Saund. 349. 2 Saund. 321. Co. Ent. 574. Winch Ent. 931, 1026, 1027, 1111. Hern. 81. Brownl. Red. 428, 430. And the Chief Justice thought, that since the Pleadings were so, the Common might be said to belong to the Copyhold Tenement, since it belonged to the Copyhold Estate; for that which belongs to the Estate belongs to the Tenement, and the Judgment was reversed after great Deliberation. Vide 1 Lut. 126. the Report of the Judgment of the Common Pleas. Salkeld 364.

There must be four Days between the Verdict and the Judgment.

Clerk versus Rowland. Trin. 5 W. & M. B. R. Upon a Writ of Enquiry, either on Demurrer or Judgment by Default, executed the last Day of a Term, the Plaintiff may enter Judgment the 5th Day after, and not before: So where there is a Verdict, there must be four Days between the Verdict and the Judgment; not that in all Cases there can be a Motion in

in Arrest, as in the principal Case, where the Verdict or Inquest is the last Day of the Term; but still there may be a Writ of Error, and this Time is allowed for these Purposes; and therefore, after Verdict or Writ of Enquiry, the Course is for the Plaintiff to give a Rule to enable him to enter his Judgment *Nisi causa ostensa sit in contrarium infra quatuor dies*; and in the principal Case, Execution was set aside, because it was sued out the 4th Day after the Term, the Writ of Enquiry being executed and returned the last Day, *Salkeld 399.*

And between the executing a Writ of Enquiry and entering the Judgment.

Anonymus. Trin. 21 Car. 2. B. R. In Trespass, the Defendant justified by reason of Common in the Place where for Cattle Levant and Couchant, and did not aver that the Beasts were Levant and Couchant; but this was held to be aided by the Verdict, *1 Vent 34.*

Want of Averment aided by Verdict.

After Verdict the Court shall admit any Intendment. Intendment to make the Case good, *1 Ventris 123.*

The King versus Ledgingham. Mich. 22 Car. 2. B. R. In an Information against him for the King, the Court took a privy Verdict, and so was said was the usual Course at the Assizes, but it cannot be so in Case of Felony or Treason, as is said in *1 Inst. 227. b.* In Cases of Life and Member, if the Jury cannot agree before the Judges depart, they are to be carried in Carts after them, so they may give their Verdict out of the County, *1 Ventris 97.*

Privy Verdict in an Information, but not in Case of Treason or Felony. Verdict may be given out of the County.

The King versus Kent. Hill. 8 & 9 W. 3. B. R. A Verdict General or Special may be amended by the Notes of the Clerk of Assize; but this

Notes.

is

is in Civil, not in Criminal Cases. *Vide 1 Ro. Rep. 82. Salkeld 47.*

Ejectment
versus 7 De-
 fendants, and
 all join in the
 common
 Rule, and the
 Issue was
 right in the
 Plea-roll, &c.
 but the *Nisi*
prius Roll was
versus 5 only;
 and after Ver-
 dict *pro Quer.*
 this was a-
 mended by
 adding the
 other two
 Defendants.

Bishop of *Worcester's Case. Mich. 8 W. 3. B. R.*
 Ejectment against seven Defendants who en-
 ter into the common Rule for confessing Lease,
 Entry and Ouster, and plead to Issue: The
 Plea-roll was right, so was the *Venire, Distrin-*
gas, and the *Jurata*; but the Issue in the *Nisi*
prius Roll was between the Plaintiff and five
 Defendants only, which was tried, and Ver-
 dict *pro Quer.* and an Amendment being mo-
 ved for, it was opposed, because it was to al-
 ter the Verdict, to subject the Jury to an At-
 taint, to make another Issue, and to make
 two Defendants Guilty who were not tried:
 But it was amended; for nothing could be
 enquired of but the Title of the Lessor, and
 the Issue depended on his Title, which is not
 altered by this Amendment. And it must be
 considered that all Seven entred into the com-
 mon Rule, and that the Plea-roll, &c. are all
 right, and this cannot be intended other than
 the same Issue, and the Amendment is only to
 rectify a plain Mistake, and make that the Is-
 sue which was apparently intended to be so,
Salkeld 48.

In the *Distringas* the Day of *Scire facias* on a Recognizance, upon Issue *non*
Nisi prius was appointed af- *solvit* it was found for the Plaintiff: Mr. Nor-
 ter the Day in they moved to set aside the Verdict, because in
 Bank, and the *Distringas* and *Jurata* the Return was *à die*
 after Verdict *Sanctæ Trin. in tres Sept. nisi Johannes Holt Mil.*
 held not a- *27 die Junii prius venerit*, the twenty-seventh
 mendable by Day of June, being the Morrow after *tres*
 the Plea-roll, *Trin.* But the Plea roll was right, for the A-
 because the ward there was *tres Mich.* It was agreed on all
 Judges Au- Sides that the Trial must be set aside unless
 thority was the Mistake could be amended, because it ap-
 confin'd to peared
 that Day.

peared the Judge had no Authority to try the Issue; and the Court held it could not be amended. The Court agreed, That where the *Distingas* or *Jurata* are right, and the Amendment does not alter the Point in Issue, the *Nisi prius*-Roll may be amended by the Plea-roll. So it was in the Bishop of Worcester's Case, and there the *Distingas* and *Jurata* were right. 2 Cro. 353. Dy. 260. Hut. 81. 1 Cro. 595. But here neither *Distingas* nor *Jurata* are right. The Day appointed for the *Nisi prius* is impossible; and the Judge's Authority is confined to the Day. And where a Judge's Authority is confined to a Day, his Trial at another Day must be without Authority, *Salkeld* 48, 49.

Where the *Nisi prius*-Roll may be amended by the Plea-roll, and where not.

Brook versus Ellis. Pas. 5 W. & M. B. R. Upon a *Devastavit* suggested against both Executors, viz. *A.* and *B.* the Writ was to the Sheriff to enquire of a Wasting by both; the Sheriff returned a *Devastavit* as to *A.* but said nothing as to *B.* This being assigned for Error, after Judgment upon a Verdict was held to be aided by the Verdict, being but an insufficient Return or Misreturn, by reason of the Omision; otherwise if no Return at all. *Vide* 3 Cro. 587. 3 Co. 81. *Noy* 72. *Cro. Car.* 295, 312. *Salkeld* 363.

Insufficient Return of *Devastavit* aided by the Verdict.

When a Verdict is found there can be nothing added to it, or taken from it, but as it is found so the Court must judge of it, and whatever is found in a Verdict whereupon the Court can give any Judgment, must be positively found, not ambiguously; for if the Jury doubt the Court can never resolve the Matter of Fact: And *Showers* held, That if the Jury do find positively the Matter of Argument, and do not make the Conclusion *de facto*,

Court must judge according to the Verdict.

facto, the Court shall reject the Matter of Argument, and give Judgment to the contrary: And for this cited *Cro. Car.* 549. *Crisp* and *Pratt's Case*, where Issue being join'd upon a Fraud, it was adjudged there, That tho' there be never so many Circumstances of a Fraud found, unless the Jury find it to be a Fraud, the Court shall adjudge it to be none, *Shower* 539.

What Matter of Record may be taken Advantage of in Arrest of Judgment, and what not. *Peachy* versus *Harrison. Trin. 9 W. 3. C. B.* It is not a good Exception in Arrest of Judgment, that there is no Warrant of Attorney filed, tho' that be Matter of Record, and may be assigned for Error. The Reason is, because, tho' it be a Matter of Record, yet it is not of that Record before the Court, but of another, *Salkeld* 77.

If the *Distringas* be returnable within Term, and there happen not to be four Days between the Trial and the end of the Term, yet Judgment shall be entered that Term. *Anonymus. Pas. 11 W. 3. B. R.* Indictment in *B. R.* for a Misdemeanor, was tried three Days before the end of the Term, and Judgment was entered the same Term; so that the Defendant had not four Days to move in Arrest of Judgment. And the Question was, Whether this Entry of the Judgment was regular, and whether it should not have been stayed till the Term following? *Et per Holt C. J.* If there be four Days and more between the Trial and the end of the Term, Judgment ought not be entered within the four Days; but if the *Distringas* be returnable within the Term, and the Party is tried within two or three Days before the end of the Term, the Judgment shall be entered that Term, tho' there be not four Days to move in Arrest of Judgment; so it was settled in the Case of *Knox* and *Levarr*, upon a Conference between *Scroggs C. J.* and *Sir William Jones Attorney-General*,

General, contrary to the Report of Sir Samuel Astrey.

Arrest of Judgment is either for Matter
 ' intrinſick, that is, ſuch as appears by the
 ' Record it ſelf, which will render the Judg-
 ' ment erroneous and reverſible ; or Extrin-
 ' ſick, *i. e.* ſome foreign Matter ſuggeſted to
 ' the Court, which proves the Writ is abated,
 ' for it is not enough that it proves the Writ
 ' is only abateable : The old Courſe of taking
 ' Advantage in Arrest of Judgment was thus :
 ' The Party after a general Verdict having a
 ' Day in Court, (for ſo he has as to matters
 ' of Law tho' not of Fact,) did aſſign his Ex-
 ' ceptions in Arrest of Judgment by way of
 ' Plea ; and it was called Pleading in Ar-
 ' reſt of Judgment. This differed from mo-
 ' ving in Arrest of Judgment, which was
 ' done by one as *Amicus Curiae*, where the
 ' Party was out of Court. *Vide Co. Entr. 295. b.*
 ' the manner of doing it. *Vide 2 Ro. 716.*
 ' 9 E. 4. 11. a. 4 H. 7. 9. 5 H. 7. 23. *Raſt. 107.*
 ' *Salkeld 77, 78.*

Two Ways
 of taking Ad-
 vantage in
 Arrest of
 Judgment.

Wood verſus Shephard. Trin. 2 Ann. B. R. It is
 againſt the ancient Courſe of the Court to
 make a Rule to ſtay Judgment, unleſs the *Pos-
 tea* be brought in ; but the Court, if there be
 probable Cauſe ſhewn, will order the *Pos-
 tea* to be brought in. *Et per Cur'*. If one moves
 in Arrest of Judgment, he ought to give No-
 tice to the Clerk in Court of the other Side ;
 but the better Way is to give a Rule upon the
Postea for bringing it into Court, for that is a
 Notice of it ſelf. *Salkeld 78.*

The Courſe
 of moving in
 Arrest of
 Judgment.

Deerly verſus the Dutcheſs of Mazarine. Hill. 8 W. 3. B. R. *Assumpsit* for Wages and Money
 lent, on *Non Assumpsit* the Defendant proved
 ſhe was married, and her Husband alive in

Where a Di-
 vorce ſhall be
 intended after
 Verdict.

U

France :

France: The Jury found for the Plaintiff, upon which, as a Verdict against Evidence, she moved for a new Trial, but it was denied; for it shall be intended she was divorced. *Salkeld* 116.

Want of Averment aided by the Verdict.

East versus *Effington*. *Mich. 1 Ann. B. R.* Indorsee declared on a Bill of Exchange against the Drawer, and the Bill was, *Pray pay this my first Bill of Exchange, my second and third not being paid*; and the Indorsement was set out in this manner, that the Drawee *indorsavit super billam illam, content. billæ illius solvend* to the Plaintiff, without shewing that it was subscribed. On *Non Assumpsit* and Verdict *pro Quer.* It was objected in Arrest of Judgment that there was no Averment that the second and third Bill was not paid, which is a Condition precedent: *Sed non allocatur. Et per Cur.* That must be intended, for the Plaintiff could not otherwise have had a Verdict: And for the same Reason also, the Indorsement which was likewise excepted against as set forth in the Declaration, was held good, being aided by the Verdict, the Court comparing it to an Action of Debt, by an Assignee of a Reversion, without shewing an Attornment, which on *Non debet*, is aided by Verdict; for if the Indorsement be necessary to transfer the Bill, so is the Attornment to pass the Reversion. *Ergo*, as the Attornment shall be supplied by the Jury's finding *Debet*, so shall the Indorsement by their finding *Assumpsit*. *Salkeld* 130.

Want of Averment, that the Money was demanded of the Drawer, no Cause for arresting Judgment.

Harry versus *Perrit*. *Trin. 9 Ann. B. R.* Action on a promissory Note against the second Indorser, and the Plaintiff declared without any Averment, that the Money was demanded of the Drawer, or the first Indorser. And this was held good upon Motion in Arrest of Judgment.

Judgment; for the Indorfor charges himself in the same manner as if he had originally drawn the Bill. *Salkeld* 133.

Rex versus North. Hill. 8 W. 3. B. R. The Defendant was indicted before Justices of the Peace, and pleaded Not guilty; and after the Jury were gone out to consider of their Verdict, he delivered in a *Certiorari*; and the Justices return'd the Verdict, and it was held well; for it cannot be delivered after the Jury is sworn. *Salkeld* 144.

Certiorari not to be serv'd after the Jury sworn.

Price versus Parker. Pasf. 8 W. 3. B. R. Upon a Motion to discontinue upon Payment of Costs, the Court held, That after a general Verdict there can be no Leave given to discontinue; but that after a special Verdict there may, because that is not compleat and final; but in that Case it is a great Favour. The same Point was so ruled, *inter Reeve and Gelding. Pasf. 5 & 6 W. & M. B. R.* *Salkeld* 178.

Discontinuance by Leave of the Court may be after special Verdict, not after general.

West versus Troles. Mich. 9 W. 3. B. R. The Plaintiff declared, That whereas the Defendant 6 *Maii* 1695, for 120 Weeks Diet then past, had promised to pay him 7*s.* per Week, and that the Plaintiff, *Postea, scil.* 6 *Maii* 1695, having found the Defendant Diet 120 Weeks then past, the Defendant promised to pay the Worth, and that it was worth 7*s.* per Week: Upon *Non Assumpsit* and Verdict *pro quer.* it was now moved in Arrest of Judgment, that the Weeks in the *Quantum meruit* are not said to be *aliae* than those laid in the special Promise, so that the Defendant is twice charged for the same Thing. *Sed non allocatur*, for they do not appear necessarily to be the same, and without Necessity the Court will not intend them so. *Salkeld* 213.

Two Counts in Nar. for Things of the same kind, not averr'd to be different: Help'd by the Verdict.

C H A P. XV.

Of Evidence in general.

Evidence.

EVidence, *Evidentia*: This Word in legal understanding (saith Coke, 1 *Inst.* 283.) doth not only contain Matters of Record, as Letters Patent, Fines, Recoveries, Inrolments, and the like; and Writings under Seal, as Charters and Deeds; and other Writings without Seal, as Court-Rolls, Accounts, and the like, which are called Evidences, *Instrumenta*. But in a larger Sense, it containeth also *Testimonia*, the Testimony of Witnesses, and other Proofs to be produced and given to a Jury for finding of any Issue joined between the Parties: And it is called Evidence, because thereby the Point in Issue is to be made evident to the Jury: *Probationes debent esse evidentes (id est) perspicuae & faciles intelligi.*

Presumption.

And this Evidence (with *Bracton*) we may term *probatio duplex, viz. viva*, as Witnesses, *viva voce*; and *Mortua*, as by Deeds, Writings and Instruments; and *Violenta praesumptio*, in many Cases, is *plena probatio*, and therefore if all the Witnesses to a Deed be dead, then the Deed shall receive credit *per collationem sigillorum, scripturae, &c.* but especially if there hath been a continual and quiet Possession; which is a violent Presumption, 1 *Inst.* 6. for no Man can keep his Witnesses alive.

Proof

If a Thing be generally referred to Proof, this shall be intended Proof by Jury; but if other
other

other manner of Proof be agreed upon, that shall take away the Proof which the Law generally intends by Jury, *Hob. 127.* As if I promise to pay what Money you prove *B.* borrowed; this may be proved in the same Action brought upon the Promise. *Vide Roll. tit. Trial, 594, 595.*

In Felonies, &c. the Persons that give Evidence for the Prisoner against the King are not sworn, but see *Siderfin 211.*

B. was indicted for striking *F.* in *Westminster-Hall*, and the Witnesses that gave Evidence for *B.* were admitted to be sworn. Indictments.

And so the Defendant's Witnesses in Appeal of Murder, 325. And the Court would not allow Evidence upon Oath, given upon the Indictment, although the Witness was dead; nor is Evidence upon the Indictment of Trespass, Evidence upon an Action of Trespass, *Ibid.*

Upon Indictments and Informations concerning criminal Offences, as against a Justice for compounding of Recognizances, &c. Upon Motion the Court will order the Prosecutor to give particular Instances that the Defendant may know what to defend. *Keble, 2 Part, 220.*

A Jew being a Witness, is sworn on the *Old Testament*, and Perjury upon the Statute 5 *Eliz. cap 9.* may be assigned upon this Oath; so if it be taken on the Common-Prayer Book, that hath the Epistles and Gospels, *Keb. 2 Part, 314. Hill. 19, 20 Car. 2. B. R.*

Proofs to determine Matter of Fact, and to Proof be offered to a Judge and Jury, are of two Sorts. First Living, as by Witnesses, and to a Jury one Witness is sufficient. And dead, as Matters of Record, as Letters Patent,

U ;

Fines,

Fines, Recoveries, Inrolments, &c. Writings sealed and delivered; and Feoffments, Leases, Releases, &c. And without Seal, as Court-Rolls, Accounts, &c. And if the Case be between the King and a Prisoner, he is first to say what he can for himself, and then all that can say any Thing against him are to be heard upon Oath, and then others may be heard for him, but not upon Oath: And according to this Evidence on both Sides, or without any Evidence at all, the Jury are to give their Verdict, according to their Knowledge and Oath.

Evidence.

The Jury are obliged to take Cognizance of what is sufficient Evidence, on pain of an Attaint.

Payment Time out of Mind, is good Evidence of an Endowment. 729.

Challenge.

Where the Evidence proves the Effect and Substance of the Issue, it is good.

In Challenge to the Array, because made at the Denomination of the Sheriff's Clerk, Evidence at his Bailiff's Denomination, is good, because favourably made is the Substance, 38 H. 6. 9.

What Evidence upon the general Issues.

Upon the general Issue the Defendant may give any Thing in Evidence, which proves the Plaintiff hath no Cause of Action, or which doth intitle the Defendant to the Thing in question.

Detinue.

But if he hath Cause of Justification or Excuse, it must be pleaded; wherefore upon *Non detinet* in *Detinue*, the Defendant may give in Evidence a Gift from the Plaintiff; for that proveth that he doth not detain the Plaintiff's Goods; but he cannot give in Evidence that the Goods were pawned to him for Money, and that it is not paid, but he must plead

plead it, 1 *Inst.* 283. For the Property is in the Pledger.

Upon the Plea, *Nul Waste fait*, in an Action Waste of Waste, he may give in Evidence any Thing that proveth it no Waste, as by Tempest, by Lightning, by Enemies, &c. But he cannot give in Evidence any justifiable Waste, as to repair the House, or the like; nor a Reparation of the Waste before the Action brought, *Ib.* For the Rule is, That the Evidence must stand and agree with the Issue.

Upon Not guilty, in an Action upon the *Parco fracto*. Statute *de parco fracto*, That the Plaintiff hath no Park, is good Evidence, 19 *H.* 8. 9.

If the Defendant plead Payment to a Bond or Bill, and it appears the Debt is very old, and it hath not been demanded, nor any Use paid for many Years, a common Presumption is good Evidence, that the Money is paid, and the Juries use to find for the Defendants in such Cases. Payment by
Presumption.

Evidence shall never be pleaded, but the Evidence. Matter of Fact shall be pleaded, and if it be denied, the Evidence shall be given to the Jury, not to the Court, *Lib.* 9. 9.

Evidence, that the Wife of every Copyholder, shall have the Land *durante viduitate*, will not maintain the Issue, that the Custom of a Manor is, That she shall have the Land during her Life, after her Husband's Death, because, though *durante viduitate* imports an Estate for Life, yet an Estate *durante vita*, is more large and beneficial, *Lib.* 4. 30. Estate for
Life.

Things done before the Memory of Man in another County, or in another Kingdom, may be given in Evidence to a Jury, as Assets in another County, &c. *Moor* 47. See *Lib.* 4. 22. 9. 27, 28, & 34. *Lib.* 6. 46, 47. What may be
given in Evi-
dence.

Payment.

Upon Issue, Payment at the Day; Payment before or after the Day is no Evidence, *Moor* 47. but upon *Nil debet*, it is good Evidence, because it proves the Issue.

Attaint.

In Attaint, the Plaintiff shall not give more Evidence, nor examine more Witnesses, than was before, but the Defendant may, *Dyer* 212.

Special Evidence upon the general Issue, by whom.

In Actions upon the Case, Trespass, Battery or false Imprisonment against any Justice of Peace, Mayor or Bailiff of City or Town-Corporate, Headborough, Portreve, Constable, Tithingman, Collector of Subsidy or Fifteen, in any of his Majesty's Courts at *Westminster*, or elsewhere, concerning any Thing done by any of them, by reason of any of their Offices aforesaid, and all other in their Aid or Assistance, or by their Commandment, &c. They may plead the general Issue, and give the special Matter of their Excuse or Justification in Evidence, 7 *Jac.* cap. 5.

A non decimando.

Prohibition for suing for Tithes in *Bocking-Park* in *Essex*, and surmised, that the Lands were Parcel of the Possessions of the Priory of *Christ-Church* in *Canterbury*, and the said Prior and his Predecessors had held it discharged of Tithes *tempore dissolutionis*, and pleaded the Statute of 31 *H.* 8. The Defendant pleads that the Prior and his Predecessors did not hold them discharged, and upon Issue joined thereon, the Evidence was, That the Prior or his Predecessors, Time out of Mind, &c. never paid Tithes; but no Cause was shewn, either by Unity of Possession, real Composition, or other Cause to shew it dis-

discharged: Cook said it was no Evidence, for it is a Prescription *in non decimando*. *Curia contra*; for a spiritual Man may prescribe *in non decimando*, and by the Statute of 31 H. 8. he shall hold it discharged as the Prior held it; and if he held it discharged, *non refert*, by what means; for it shall be intended by lawful Means, and the Jury afterwards found it for the Plaintiff, Cro. 3 Part, 2, 6. Keble, 2 Part, 45.

In Nil debet, upon the Stat. for Tithes, a Lay Person cannot give a *Non decimando* in Evidence; so may the King, and any other spiritual Persons. li. 2. B. of Winchester's Case.

If a Church-Book, or any Thing else be given in Evidence, which ought not to be allowed, the Court above cannot quash the Verdict, except it be certified and returned with the *Postea*. Brownlow, 1 Part, 207. But the Court may order a new Trial, upon Cause shewed, as for excessive Damages, &c.

A Church-Book is no Evidence. Brownlow, 1 Part, 107. *Postea*. 26 *Assise*, pl. 4.

The Court will not permit the Jury to carry any Writings out with them, but what are proved, and under Seal.

The Certificate of the King under his sign Manual, was allowed in Chancery for Proof without Exception, Hob. 213.

Upon a Traverse of a Lease Parol for Years, viz. *Absq; hoc quod A. dimisit, &c. Nihil habuit in tenementis*, may be given in Evidence, Dyer 122.

Shewing a Grant to dig Turfs, is no Evidence against a Prescription for the same, but the Grant being the same with the Prescription, shall be taken as a Confirmation, Crew and Vernon, Moor 819. *Quere tamen*, vid. Moor 830. Where a Court of Piepowder is claimed by Prescription and Grant, and good, 2 Cro. 313. Acc.

The Confession of a Party must be taken whole, and not by Parts; as if to prove a Debt, it be sworn that the Defendant confessed it, but withal he said at the same Time, that he paid it, his Confession shall be valid as to the Payment, as well as that he owed it, *per Hale* Chief Justice. And so is common Practice.

Office of the
Jury.

The Jury are to decide the Fact, and Evidence is not given but to inform them in their Consciences of the Truth; for although no Evidence is given of either Side, yet they may give their Verdict of one Side or other. 14 H. 7. 29. And therefore although two Witnesses are necessary, where the Trial is by Witnesses, as in the Civil Law; yet they are not of Necessity where the Trial is by Jury. And where Witnesses are joined with the Jury, yet they may be rejected, if they will not agree with the Twelve, and the Twelve may give their Verdict.

Done in Tayle.

The Jury after they are departed from the Bar, may return to hear their Evidence of any Thing they doubt before the Verdict.

Sur Travers de done in Tayle, the Witnesses prove, That another made the *Done*; this doth not warrant the Issue.

Extortion
vers. vic. Fee.
Possession.

In an Action against the Sheriff upon the Statute of Extortion, that he took it for Bar-fee of one who was acquit, is good Evidence.

Possession is an Evidence of Right, and he that hath Possession may distrain the Cattel of him that hath no Title, for the taking is in respect of the Possession more than of the Title.

A Receipt of the last half Year's Rent is Evidence that all before was paid.

Par-

Parson or not Parson, in such Issue you Parson.
may give in Evidence a Resignation, although
it be in another County and spiritual.

In *riens passe per le fait*, nor his Deed may *Fait*.
be given in Evidence.

To lay a Custom to a House and Land, Custom.
to prove it to Land only, not good. *Godbolt*

234.

'Tis good Evidence to convict one upon the
Statute *Eliz.* for not coming to Church, to Church.
prove that the Party was not at his Parish-
Church such a Sunday, and the Party may
shew that he was at Church elsewhere.

After Evidence given, and the Jury ready Former Trial.
to give their Verdict; and then the Attorney-
General will not proceed, but draws a Juror,
and brings another Information, none of the
former Jurors shall be admitted to give in E-
vidence, that the Jury were ready to give
their Verdict against the King in the first In-
formation, for this ought not to be discover-
ed, for so no Benefit would accrue to the
King by his Prerogative to draw a Juror.

But this may be given in Evidence in What may be
another Action, where the King is not con- given in Evi-
cerned. dence upon a
special Issue.

Upon an Issue of Common appendant, &c. Common.
common pur cause de vicinage cannot be given
in Evidence.

If an Advowson be pleaded to be granted *Grant per fait*,
per fait, and this Issue is taken by a Stranger Where it is
to the *Fait*, if it be found granted *sans fait*, or sufficient to
by another *Fait*, it is good; for the Deed is prove the Ef-
fect of the
surplus, and the Effect of the Issue is upon the Issue.
Grant, not upon the *Fait*.

If a Man plead Not guilty, he cannot
give in Evidence a Matter justifiable, which
shall

What Things may be given in Evidence upon the general Issue. **Trespass. Battery.** shall be a Confession of the Act, for this is contrary to the Issue. As *Son assault demesne* in Battery upon Not guilty: But upon Not guilty in Trespass for beating one's Servant, *per quod servitium amisit*, you may give in Evidence, that the Plaintiff did not lose his Service by the Battery.

Waste. Nor upon *nul wast fait*, can he say, *sufficientment repair devant le brief purchase*.

Libel. In an Information for Writing, Printing and Publishing a Libel, That Copies were found in the Defendant's Chamber, is no Publication, without discoursing it, or Delivery of it out, *Keble*, 2 Part, 502.

What Evidence the Jury may have with them. **Exemplifications.** The Jury can have nothing but what is delivered to them in open Court, and given in Evidence by the Party in Court: If an Exemplification come out of *Chancery* of Witnesses examined there upon Oath, who are dead, the Jury shall have this with them; but if the Exemplification comprehend some Witnesses alive and some dead, they shall not have it with them. Neither shall they have any Pedigree drawn by a Herald at Arms, for it is no Evidence, only Information for Direction.

Pedigree. Not an Office before an Escheator, unless exemplified, nor a Testimonial, nor a Part of a Fine indented, unless exemplified, but they may find the same specially.

Terror. Conventicle of thirty or forty is Evidence of Terror, &c. *Keble*, 2 Part, 558.

Matter in Law. *Vaughan's Rep.* 143. Matter in Law is not to be given in Evidence, for the Jury are only to try Matters of Fact. The adverse Party may demur to such Evidence. 3 H. 6. 36.

A Writing or Answer permitted to be read *Totum & pars.* in part, may be read in *toto*.

The Counsel of that Party which doth be- Counsel.
gin to maintain the Issue, whether of Plain- Issue.
tiff or Defendant, ought to conclude.

The Jury may carry from the Bar an Exemplifica-
Exemplification under the Great Seal, of De- tion.
positions in *Chancery*, but if they are not
exemplified, the Jury can only look upon them
at Bar, but not have them with them out of
Court.

In Evidence, he which affirms the Matter
in Issue, ought first to make the Proof to the
Jury, *Ib.* 36.

The King's Message or Letter shall not be King.
allowed for Evidence between Party and Par-
ty; otherwise where the Matter was secret,
and that the King only had personal Know-
ledge, as in *Sir George Reynel's Case*, Co. 9.
Rep.

Upon Evidence at Bar it was agreed, That *Mich. 18 Car. 2.*
an old Impropriation shall be presumed to be *B. R.* 66.
well and lawfully made. A Vicar might an- *Smith v. Raw-*
ciently have been endowed without a Deed *lins.* Impro-
sealed, being only an Ordination of the Bi- priation, Vi-
shop, and Allotment of Maintenance. car.

The Chief Justice said, If a Man be over- Hand.
sea or dead, the Party shall be admitted to
prove his Hand by Witnessess, or comparing
with other of his Writings, to which the
Court agreed.

In an Action brought by a Woman for slan-
dering of her, by which she lost her Mar- Marriage.
riage with *J. S.* the Marriage with *J. S.* is *Starch v. Ely,*
not traversable, but ought to be proved in *24 Car. 2.*
Evidence. *Ret.* 494.

Custom of foreign Attachment may be Foreign At-
pleaded or given in Evidence, 3 *Keble* 221. tachment.
Evi-

Evidence may be given to mitigate Damages, in all Cases where Damages are to be recovered; as in Waste, that the Premises were ruinous at the Time, &c. or burnt by Enemies, &c. See *Olive and Gwin's Case*, in *Siderfin*, 2 Part, 155. in the *Exchequer*, good Matter concerning Evidence, where 'twas adjudged, that a Record had in *Brecknock* in *Wales*, under the Seal of *Brecknock*, might be given in Evidence. See *Hardres Rep.* 118.

Refusing to give Evidence is a Contempt, and fineable.

Lord *Preston* was committed by the Court of Quarter-Sessions for refusing to be sworn to give Evidence to the Grand Jury on an Indictment of High Treason. He was brought by *Habeas Corpus* in *B. R.* and *Holt C. J.* said, it was a great Contempt, and that had he been there, he would have fined him, and committed him till he had paid the Fine; but being otherwise, he was bailed. *Rex versus Preston. Salkeld* 278.

On Indictment, Evidence may be of the Fact done at any Time, not after the Indictment, and at any Place in that Country.

Charnock was indicted, for that he the 10th of February, 9 W. 3. & *diversis aliis diebus & vicibus tam antea quam postea*, in the Parish of *St. Clement Danes*, did traiterously conspire to kill the King. *Et per Holt C. J.* Evidence may be given of a treasonable Conspiracy, &c. at any Time before or after the Time alledged in the Indictment:

1st, Because 'tis only a Circumstance and of Form: Some Day must be alledged, but it is not material.

2dly, The Indictment lays it to be at divers Days and Times, as well before as after, and thereby comprehends what was done last Year, as well as this; and as the Evidence may be of Matters before that Time, so it may be of Matters also at any Time after the Time specified in the Indictment, provided it be

be not after the Time the Indictment was found; neither is the Evidence tied up to the Place; for it may be of any Place, provided it be not out of the County; and so it is of all criminal Cases. *Salkeld* 288.

Generally Persons are presum'd to be living if the contrary be not prov'd, 2 *Roll. Rep.* 461. *Throgmorton versus Walton.*

Person pre-
sumed to be
living till
Proof to the
contrary.

But by 19 *Car. 2. cap. 6.* If Persons for whose Lives Estates are granted, remain beyond Sea, or absent themselves in this Kingdom seven Years together, and no evident Proof be made of their Lives, in any Action commenced by the Lessors or Reversioners for Recovery of such Tenements, they shall be accounted as dead. *Unless absent for seven Years.*

Provided, That if after any Persons shall be evicted by Virtue of this Act, the Persons upon whose Lives such Estates depend, shall return from beyond Sea, or on Proof in any Action for the same, be made appear to be living, or having been living at the Time of the Eviction; the Tenant, who has ousted his Executors, &c. may enter, &c. And upon Action against them that receiv'd the Profits, recover for Damages the full Profits, with lawful Interest.

And by 6 *Annæ, cap. 18.* Every Person who hath any Claim to any Remainder, Reversion, or Expectancy of any Estate whatsoever, after the Death of any other Person, upon Affidavit in Chancery, by the Persons claiming Title thereto, and that they have Cause to believe that such other Person is dead, and such Death conceal'd by the Guardian, Trustee, or other Person, may, once a Year, if the Person griev'd think fit, move the Lord Chancellor to order such Guardian, or such

Where one in Possession of an Estate shall be concealed from the Reversioner, and not shewn to him once a Year, such Person shall be taken for dead without other Evidence.

Per-

Person suspected to conceal, to produce to such Person and Persons, such Person suspected to be concealed; and if such Guardian, &c. shall refuse or neglect to produce the Person on whose Life such Estate depends; then the said Court is to order such Guardian, &c. to produce the Person conceal'd, in *Chancery*, or before Commissioners appointed by the Court, (two of which Commissioners to be named by the Prosecutor). And if such Guardian neglect to produce such Person so conceal'd, and the Return be filed in the *Perit Bag*, the Person conceal'd shall be taken to be dead; and the Person claiming may enter on such Estate.

No Evidence of a simoniacal Promotion after the Death of the Party concerned.

By 1 *W. & M. Sess.* 1. *cap.* 16. It was enacted, That after the Death of any Person simoniacally promoted to a Benefice, the Offence or contract of *Simony*, shall neither by Way of Title in Pleading, or in Evidence to a Jury, or otherwise be alledged or pleaded to the Prejudice of any Patron innocent of *Simony*, or of his Clerk, upon pretence of Lapse, or otherwise, unless the Person simoniacally promoted, or his Patron were convicted of such Offence at the Common Law, or in some Ecclesiastical Court in the Life of the Person simoniack.

Peer sworn as a Witness.

A Peer produced as a Witness ought to be sworn, 3 *Keb.* 631. *Earl of Shaftsbury* versus *P. Digby*.

Wife.

The Wife is not obliged to discover the Husband's Treason.

In Escape, what Evidence.

No retaking shall be given in Evidence in an Action of Escape, unless specially pleaded, and Oath be made by the Keeper of the Prison, that such Escape was without his Consent;

sent; but if such *Affidavit* prove false, such Keeper shall forfeit 500 l. 8 & 9 W 3. cap. 27.

Every Keeper's refusing after one Day's Notice to shew the Prisoner in Execution to the Creditor or his Attorney, shall be adjudged an Escape. *Ibid.*

Persons desiring to charge any Person with an Action or Execution, shall, at their Request, have a Note in Writing from the Keeper of the Prison, whether such Person be a Prisoner, or not, under Forfeiture of 50 l. And such Note shall be sufficient Evidence. *Ibid.*

A Note from the Gaoler, Evidence of a Person's being a Prisoner.

Where a Woman conceals the Death of her Bastard-child, it shall be look'd upon as murder'd by her, unless she can prove by one Witness at least, that it was Still-born. 21 Jac. 1. cap. 27.

Concealment, Evidence of Murder.

In an Ejectment brought by the Lessee of *Pride* on a Trial at Bar in the *King's Bench*, before *Holt C. J.* and *Eyre J.* The Plaintiff entituled himself to the Lands in question, as Heir to *George*, late Duke of *Albemarle*, by being Son to a Daughter of *Monk*, who was elder Brother to the Duke. (Supposing the Duke died without Issue,) The Defendant claim'd under a Deed, and also under a Will of *Christopher*, Son to Duke *George*.

Bastardy admitted to be prov'd after the Party's Death.

To which the Plaintiff replied, he was not Son to Duke *George*, but a Bastard, because at the Time Duke *George* married the Mother of the said *Christopher*, she had a Husband then living, and so the Marriage was void; and the Plaintiff produced several Witnesses who endeavoured to prove this Fact. To this the Counsel for the Defendant objected, That they ought not to be admitted to give Evidence to bastardize a Man that was dead, and

after the Death of his Father and Mother, who were married in 1653, and cohabited together as Man and Wife continually, to the Time of their Death, which was ten Years after; and Duke *Christopher* was acknowledged as Son and Heir to Duke *George*, unto the Time of his Death, which was in 1668; and was call'd Son and Heir in the Settlement and Will of Duke *George*, and enjoyed the Estate accordingly; and the Defendant under him, by Settlement, for above twenty Years: And Duke *Christopher* also sate in Parliament as Son and Heir to Duke *George*; and in a Patent made by King *Charles* the Second, was so stiled, and in an Act of Parliament that pass'd to enable him to dispose of Lands that were settled on him as such; and therefore they insisted that no Evidence should be given to bastardize him: But the Judges were of Opinion, that if the Facts were true, the Marriage was null and void, and the Jury might find the Facts; and this Evidence was admitted, 3 *Lev.* 340. The Rule that one shall not be bastardiz'd after his Death, holds only in the Case of Bastard-eigne and *Mulier-puisne*. *Pride* versus The Earls of *Bath* and *Mountague*. *Hill.* 6 *W.* 3. *B. R.* 3 *Lev.* 340. *Salkeld* 120.

Deceit of the
Factor be-
yond Sea,
Evidence to
charge the
Merchant in
an Action of
Deceit.

In an Action on the Case for a Deceit, the Plaintiff set forth, That he bought several Parcels of Silk for Silk: On Trial, upon Not guilty, it appeared that there was no actual Deceit in the Defendant who was the Merchant, but that it was in his Factor beyond Sea; and the Doubt was, If this Deceit could charge the Merchant? And *Holt* C. J. was of Opinion, That the Merchant was answerable for the Deceit of his Factor, tho' not *criminaliter*, yet *civiliter*; for seeing
some

some Body must be a Loser by this Deceit, it is more reasonable that he that imployes and puts a Trust and Confidence in the Deceiver, should be a Loser than a Stranger; and upon this Opinion the Plaintiff had a Verdict. *Herr versus Nicholls. Salkeld 289.*

Of Evidence by Witnesses.

Men that are so branded with Infamy, that *Witnesses* they cannot be Jurors, (for which see before who may be Jurors) cannot be Witnesses; yet *per Glyn* Chief Justice and *Newdigate* Justice, *Mich. 1657. B. R.* Conviction of common Barrettry hinders not from being a Witness; but *Maynard* Serjeant held strongly against it.

At Lent Assizes, *Suffolk, 1657. St. John* Chief Justice, *C. B.* would not allow one who had been whipped for Petty Larceny, to be a Witness; but *Earl* Serjeant said, they ought to be *stigmati* that are disabled from being Witnesses: Yet *per Rolle* Chief Justice, one burnt in the Hand for Felony may be a Witness; for he is in capacity to purchase Lands, and his Fault is purged by his Punishment. *Style 388.*

The Wife cannot be a Witness for or *Who may be* against her Husband, *1 Inst. 6.* that is, in case *Witnesses.* of a common Person, between Party and Party; but between the King and the Party on an Indictment she may, although it concern the Feme her self, as in the Lord *Audley's* Case, *Hutt. 116.* So she may have the Peace against her Husband.

In an Indictment prosecuted by the Husband, for seducing away his Wife, and keeping her some Time in Adultery. The Wife

was admitted to be a Witness against the Defendant, *Coram Judice Wyndham*, Lent Assizes at *Aylesbury*, and the Defendant was found guilty. She may be a Witness to prove a Cheat upon her and her Husband. *Sid.* 431.

And so it was resolved in *John Brown's Case*, *Trin.* 25 *Car.* 2. *B. R.* on the Statute of 3 *H.* 7. *cap.* 2. *vid.* 1 *Cro.* 492.

The King cannot be a Witness by his Letters under his Signet Manual: One attainted of Piracy cannot be a Witness to prove another guilty. If he accused another before he was attainted, and afterwards confesses he wronged him, this Confession shall be rejected, because he is attainted. A Woman cannot be a Witness to prove a Man to be a Villain. *Co. Litt.* 6. 8.

But an Attorney cannot be a Witness against his Client for Matters subsequent to his being employed.

Neither can the Party to the usurious Contract be a Witness against the Usurer, in an Information upon the Statute of Usury. But Kinsmen never so near, Tenants, Servants, Masters, Counsellors, and Attorneys, &c. may be Witnesses. A Counsellor may be a Witness to the Agreement, &c. but not to Validity of an Assurance, nor to the Counsel he gave, *March, Rep.* 43. If a Witness being served with Process, and having Money sufficient to bear his Charges, (or less, if he accept it) do not appear to give his Testimony, he forfeits 10 *l.* to the Party damnified, and must recompence his Damages. 5 *Eliz.* 9. If a Witness commit wilful Perjury, he loseth 20 *l.* shall be imprisoned six Months without Bail, stand in the Pillory, and be disabled to be a Witness; so shall the Suborner who procures the Perjury. 5 *Eliz.* 9.

A Party robbed is allowed a good Witness in his own Action against the Hundred, for he

he is not bound, nay is to be blamed, to tell any one what charge he carries with him; and if he should not testify, the Law would be often fruitless for want of Evidence, or else more Robberies committed by the Party's discovering his Money.

In the Case of *Brereton and Tatam, Mich.* 1656. *B. R. Glyn* Chief Justice cited the Lord *Chandois's* Case in this Court, where one *Gates* an Executor was produced to prove the Will, as a Witness, to which he (as Counsel) excepted, because of his Executorship. It was answered that he had fully administered: He replied, that Assets might afterward come to his Hand; but the Court resolved that it would not be presumed to bar his Testimony, which was allowed in the principal Case, being in Ejectment.

It's no good Exception to a Witness that he hath Common *pur cause* of *Vicinage* in the Lands in question, because it's but an Excuse of Trespas, and no Interest. *Clapham's Case. Mich. 1657. B. R.*

The same of Common of *Shacke*.

If Obligee devises the Debt to the Obligor, and his Executors deliver up the Bond in Satisfaction of the Legacy, which is cancelled, and after the Validity of the Will is questioned, *viz.* whether the Testator was *compos*, &c. the Obligor is a good Witness for the Will, because by the Cancelling of the Bond his Debt was discharged. But *Contr.* in Case of Mortgage, for though the Deed be cancelled, if it be no good Will, he must pay the Money. *Goodman versus Turbervil. Mich. 1657. B. R.*

An Action was brought by the Corporation
of the Weavers of *Norwich*, for a Penalty
X; against

against a Weaver for working at his Trade in Harvest-time, contrary to an Ordinance by them made. And *Atkins* Justice, allowed one of the Corporation to be a Witness, though one Moiety of the Penalty was due to the Corporation. *Lent Assise* 1657.

In a Trial at Bar, where an Estate for Life is limited to *J. S.* Remainder to the Poor of the Parish of *Greenwich* by Will; the Inhabitants of *Greenwich* were allowed to be Witnesses to prove the Will. *Townsend and Roan. Mich.* 1658. *B. R. Siderfin*, 2 Part, 109.

An Action of Debt was brought, Summer Assizes, *Suff.* 1669. by the Town of *Ipswich*, for 50*l.* a Fine set upon one chosen Common Council Man (called their prime Constable) for refusing to renounce the Covenant, &c. And the Town-Clerk (though a Freeman) was allowed a Witness to prove Election, Refusal, &c. and the Fine set, which is for Necessity, for that none other are or ought to be present at those Acts. *Rainsford* Justice.

Per Hale Chief Justice, *Norfolk* Summer Assizes 1668. A Freeman of *Lynn* is not an allowable Witness to prove the Custom of Foreign bought and Foreign sold in that Town. *Hurwicke* versus *Twels*.

As to Witnesses Privileges.

One was Subpena'd *ad testificandum*, and prayed a Privilege from being arrested, which was granted, and *per Cur.* It will supersede an Arrest upon mean Process, but not upon an Execution; yet the Sheriff in that Case may be committed for his Contempt. *Hen. Nevil's Case, Mich.* 15 *Car.* 2. *B. R.*

De-

Detaining of Witnesses:

Sir *Jo. Jackson* was convict of an Information for preventing of Evidence to be given on an Indictment of Perjury against *Fenwick* and *Holt*, who had been Witnesses for Sir *J. J.* he arrested some Witnesses, and gave Money to others, and so they were acquitted: He was fined one thousand Marks, one Month's Imprisonment, Behaviour for twelve Months. *Hill. 1663. B. R.*

Such Persons as are Infamous, as are Persons attainted of Felony, or of a false Verdict, or of a Conspiracy, or of Perjury, or of Forgery, upon the Statute of *5 Eliz. cap. 14.* and not upon the Statute of *1 H. 5. 3.* and such as have had Judgment to lose their Ears, or stand on the Pillory or Tumbrel, or have been stigmatized or branded, and Infidels, Men not of sound Memory, or not of Discretion, or such as are interested in the Cause, or have Benefit, are not competent Witnesses. *Co. 1 Inst. 6.* but we see Jews are daily admitted Witnesses.

By Order of Court the Depositions taken of a Sick Witness may be given in Evidence.

'Tis dangerous to permit Evidence to a Jury by Witnesses, that there was such a Deed, which they have seen or read, or prove the Deed by a Copy, because the Deed may be upon Condition, Limitation, or Power of Revocation; and if this should be permitted, the whole Reason of the Common Law, in shewing Deeds to the Court, would be subverted; for the Deed might be imperfect and void, which the Witnesses could not perceive; yet in Cases of Extremity, as where the Deed of the Deed, and that they are as the Copy is, the Copy ought not to be allowed Evidence, unless examined.

Deed.
Kebble, 2 Part.
546 Instances
of a Copy not
examined, al-
lowed and
disallowed in
Evidence;
but I think
unless the
Witness,
swear that he
remembers
the Contents

was burned, or lost by some other notorious Accident, the Judges may at their Discretion, allow them to be proved by Witnesses, *lib.* 10. 92. and so of a Record.

Who may be Witnesses.

Not Persons interested either in Law or Equity, in

presenti or *future*. Usury.

If a Man makes a Feoffment and afterwards makes another, with Covenants that he was seized, &c. and afterwards an Issue is taken upon the first Feoffment, the Feoffee shall not be a Witness.

In an Information for Usury, the Party shall not be a Witness, because he would thereby avoid his own Bonds, &c. and be *testis in propria causa*.

In case of Forgery, Perjury and Usury, the Party grieved may have Advantage by the Verdict, and therefore shall not be received as a Witness; but in Case of an Indictment for Battery, he that was beaten may be Witness, because he can reap no Benefit by the Verdict in another Suit. *Hardres Rep.* 331.

Perjury.

Three Men swear an Arbitrement in three several Actions against them, upon the Statute 5 *Elix.* of Perjury, each of them may be a Witness for the other; but in an Indictment of Perjury upon 5 *Elix.* the Party grieved shall not be a Witness, for he is to have 20*l.*

Common Experience tells us upon an Indictment for Battery, &c. the Party grieved may be a Witness, because 'tis only for the King.

Hundred.

In an Action against the Hundred upon the Statute of *Winton*, &c. the Lessor living out of the Hundred may be a Witness, for 'tis not reason that he and his Lessee being an Inhabitant should be both charged: If the Servant be robbed of the Master's Money, the

the Master may be a Witness to prove the Delivery of the Money to the Servant before the Robbery. *Roll. tit. Trial*, 686.

A Juror who is a Witness must be also Juror. sworn in open Court to give Evidence, if he be called for a Witness; for the Court and Council are to hear the Evidence as well as the Jury.

If a Witness be Bail, upon Motion the Bail Court will give leave to alter the Bail. *Style* 385.

Debt on 5 *El.* 9. Because the Wife did not appear, whereas he charged her and tendered to her her Charges, and though not laid what Damages, yet being for the 10 *l.* upon the Statute, not for his Damages for her not appearing, and a Feme Covert being within the Statute, 'twas held good enough, 3 *Cro.* 130. *Leon.* 122. Note, She being the Person who was to appear, the Charges are to be tendered to her or her Husband. Wife.
Charges.

Debt for 10 *l.* against a Witness, upon the Statute 5 *Eliz.* doth not lie, unless the Witness hath his Charges, and he is not bound to come without his Charges first paid: But if he accept of 12 *d.* and a Promise for the rest at the Trial, he is bound, and an Action lieth against him if he doth not come. *Cro.* 1 Part, 522, 540. *Goodwin* against *West*. Charges.

A Copy of his Retainer by a Nobleman, Chaplain. entred in the Court of Faculties, denied to be given in Evidence. *Littleton, Rep.* 1. But one that had seen it under the Hand and Seal of the Nobleman, was allowed a good Witness, because the Plaintiff was a Stranger, &c. Quare Impedit.

Counsellor.

A Counsellor may be examined as a Witness against his Client, so far as it is of his own Knowledge, not what his Client reveals to him, but what he knows only by his Client's Information.

Counsellor.
Spark against
Middleton.
Keble, 1 Part,
505.

Mr. Aylet having been Counsel for the Defendant desired to be excused to be sworn on the general Oath, as Witness for the Plaintiff, to give the whole Truth in Evidence, which the Court after some Dispute granted, and that he should only reveal such Things as he either knew before he was of Counsel, or that came to his Knowledge since by other Persons, and the Particulars to which he was to be sworn were particularly proposed, *viz.* What he knew touching a Will in question, and the Court only put the Question, whether he knew of his own Knowledge, &c.

Tenant at
Will.

Tenant at Will of part of the Lands was admitted to prove Livery of Seisin, and the Execution of a Feoffment under which he held, *Bulst.* 1 Part, 202.

Attainted of
Felony.

If one be attainted of Felony and pardoned, he shall not afterwards be sworn of a Jury, for *Pæna mori potest, culpa perennis erit*; and therefore is not fit to serve on the Inquest, nor yet to be an indifferent Witness; and two such Persons proving a Suggestion, were rejected, and the Prohibition disallowed, *Brown* against *Crasham*. *Bulst.* 2 Part, 154.

Simul cum.

In Trespass with a *Simul cum*, if nothing be proved against them in the *Simul cum*, they may be examined as a Witness. *Style's Rep.* 401.

Poors con-
cerns.

Neither he that pays or takes Collection can be a Witness in such Cases.

Cestui

Cestui que Trust is not to be admitted a Witness where the Title of the Land comes in question

One who would have any collateral Title Trust to the Land, as if he hath a good Deed by the Ancestor, who would charge the Lands in the Hands of the Heir, is not to be admitted an Evidence.

But one who has an equitable collateral Title upon the Land is admittable to be a Witness.

Indictment of Perjury doth not disable a Witness; otherwise of a Conviction, whether it be by Common Law or Statute. *Pasc. 20 Car. 2. Colt verf. Colt. Perjury.*

A Trustee cannot be a Witness concerning the Title of the same Land, the Interest in the Law being lodged in him.

By *Twisden* and *Wyndham*, if an Action be brought against two, and no Evidence is given against one, he may be a Witness himself in the Case. *Mic. 19 Car. 2. B R. 67. Witness.*

In Debt against the Heir upon an Obligation made by his Ancestor and J. S. jointly and severally, J. S. was sworn a Witness for the Plaintiff. *Joint Obligation.*

In Trespass against *A. simul cum B. & C. B.* *Hil. 1651.* *& C.* are admittable to be Witnesses if the Plaintiff hath not arrested them, or at the least demanded Process of the Sheriff to do it. *Coram Rob. Trespas. Simul cum.*

A Clerk attending upon a Grand Jury shall not be compelled to be a Witness to reveal that which was given them in Evidence. *Trin. 1650. Grand Jury.*

Plaintiff recovers against the Defendant upon the sole Evidence of J. S. and has Judgment, and afterwards J. S. was convicted of Perjury upon the the same Evidence; notwithstanding

standing the Court would not set aside the Judgment. But if it had been after Verdict that an Indictment of Perjury was depending against *J. S.* the Court would have stop'd entering the Judgment till the Perjury tried.

Mic. 22 Car. 2.
B. R. Roy vers.
Serjant.

It was doubted by *Twisden*, that if one upon Evidence forswear himself, and afterward the principal Action is annulled by Writ of Error, if afterwards he is indictable for this.

Felony.

By *Rolle*, If one convict of Felony be pardoned, or is burnt in the Hand, he may be a Witness again.

After Conviction and Clergy allowed, one is capable to be a Witness, *per Cur'.*

24 Car. 1.
Radford's
Case.

Radford brings an Action of Debt upon the Statute of 5 *Eliz. cap. 9.* for 10*l.* against *J. S.* and declares that he was warned by *Subpæna* to appear such a Day at one of the Clock in the Afternoon to be a Witness, &c. And upon *Nil debet* pleaded, the *Subpæna* given in Evidence was generally to appear at this Day, and not at such an Hour; and although a *Subpæna* to appear at such a Day be of that Effect, that the Party ought to attend the whole Day, and so as it was objected, includes that he ought to appear at this Hour, yet in respect of the Variance it cannot be said to be the *Subpæna* on which the Plaintiff did declare, and therefore he was nonsuited; and in this case no Regard was had to the Ticket left with the Defendant, which was according to the Declaration.

Subpæna.

Guardian.

Guardian in Socage shall be admitted to be a Witness for the Infant, for he is accountable.

A Trustee may be a Witness against his Trustee. Trust, by *Hale* Chief Justice; but *Twisden* doubted thereof.

Case in a feigned Issue out of the Chancery, to try the Forgery of a Will of Sir — *Cuts* *versus* *Pickering* B.R. *Pas. 24. Car. 2.*
Cuts, whereby he gave to his Cousin *Dorothy*, now *Pickering's* Wife, such Lands for 99 Years, wherein it was said, *That if she so long live* was rased out, and so made absolute for so many Years. And one Mr. *Baker* was called a Witness for the Plaintiff, who desired the Direction of the Court, whether he should be sworn, because he was Solicitor in the Case for the Defendant. The Court said, That about the Matter before he was employed he is to be sworn; but we will not examine him about any Privacies, in what he is employed since that Time; and Mr. Attorney-General said he demurred in Chancery for the same Cause, and was over-ruled to be examined. And it was held, a Man cannot give in Evidence an Hearsay, though the Man be dead; but a Man may give in Evidence an Hearsay of an A& at the present Time, thereby to fortify and corroborate what the other says. *Hearsay.*

One Coparcener not to be Evidence for another in Ejectment, because she claims by the same Title, though not Party to the Suit. But the Daughter of her Sister may be sworn, for although she should be Heir, yet her Mother may give the Lands to whom she will, being Fee-simple. *Pasc. 13 Car. 2. B. R. Truel, vers. Caspek. Coparcener.*

Witnesses may be sworn against the King in criminal Causes, not in Capital, *Rex* *versus* *Percival*, *Hill. 15 and 16 Car. 2. B. R.*

Legatee

Will.

Legatee or Devisee of an Annuity may be an Evidence to prove the Will, if he hath received it, or released it; and this though after the Action commenced, *Siderf. Rep.* 315.

Equitable Interest.

An Interest in Equity disables a Man to be a Witness, 2 *Keble* 345.

Escape.

Creditor.

After four Months that a Dividend is made, a Creditor is a good Witness; for no other Dividend shall be intended, 3 *Keble* 348. *Bents* and *Mico*.

Mrs. Celiers's
Case, *Pasc.* 32.
Car. 2. B. R.

If a Witness be convicted of Felony, and afterwards pardoned, whether he shall be thereby restored to be a good Witness? And *Scroggs* Chief Justice, and *Raymond* Justice were of Opinion that he could not, because the Pardon doth take away the Punishment due to the Offence, but cannot restore the Person to his Reputation; and of that Opinion was Justice *Nichols*, *Moor* 872. in *Cuddington* and *Wilkins's* Case; But Justice *Jones* and Justice *Dolbin* cont. And afterwards *Raymond* was of their Opinion: For in *Hobart's* Reports of *Cuddington* and *Wilkins's* Case, it is said, That the Pardon takes away not only *panam* but *reatum*. Another Query was, Whether a Man convicted and burnt in the Hand be stigmatized as to his Testimony? And *Jones* Justice held he is not, because the burning in the Hand is no Part of his Judgment; and is by 4 *H. cap.* 13. only to notify to the Judge, that he hath had his Clergy before, 5 *Co.* 50. a. *Biggin's* Case. But having examined the Case, do find no Judgment given therein, but compounded as it's reported both 3 *Cro.* 682. and by *Moor* 571. And *Cro.* says there were two Judges against two. And *Moor* says, it was agreed, the King could not pardon the burning in the Hand in an Appeal; and in Truth,

Felons.
Pardons.

it seems to be Part of the Judgment, for the Entry is, *Ideo consideratum est quod le Offender counterizetur in manu sua laeva.* Rast. Entries, 1. b. 56. a. But upon the whole Matter it appears by *Heston's Case*, cited in *Foxley's Case*, 5 Co. 110. That the burning in the Hand is (by Virtue of 18 Eliz. cap. 6. which saith the Prisoner shall be forthwith enlarged) in the Nature of a Pardon.

Dangerfield was produced as a Witness, who had been found Guilty of several Indictments of Felony for which he had his Clergy, and was burnt in the Hand. And upon other Indictments he had been on the Pillory for cheating, but had obtained his Pardon under the Great Seal for all his said Offences. A Question did arise, whether he might be a Witness? and thereupon the Prisoner did desire to have Counsel assigned him, and it was granted. And *Darnel* one of his Counsel urged, That *Dangerfield* ought not to be a Witness, for he was blemished, and the Pardon had not restored him, and cited 2 Brownl. 7. where it's said, That the King pardoned a Man attainted for giving a false Verdict, that he shall not be at another Time impanelled upon a Jury; for though the Punishment were pardoned, yet the Guilt remains, 2 Bulstr. 154. *Brown versus Crasshaw*. In a Prohibition, the Suggestion was proved only by two Persons attainted of Felony. And *Coke* Chief Justice cited *Hill*. 11 H. 4. 41. b. Pl. 7. That if a Man be attainted of Felony and pardoned, he shall not after be sworn upon a Jury, because he is not *probus & legalis homo*. But the Court willing to be thoroughly satisfied, sent Justice *Raymond* to the Court of Common Pleas, to know their Opinion in this Point; and

Trin. 31 Bar. 2.
B. R. en
Count de
Castlemain's
Case, for in-
tending to
kill the King.

Clergy.

Pardon.

and the Judges there resolved, That the burning in the Hand was, *quasi* a Statute-Pardon to Felony, and as to that he was a good Witness, and the King's Pardon made him a good Witness as to the other Offences; but they said, had he not been burnt in the Hand, the Pardon would not have restored him to his Credit again, because in his Testimony the People are concerned, and consequently the Pardon will not deprive them of their Interest. And thereupon the Judges here allowed him to be a good Witness; and with the Opinion of the Judges of the Common Pleas, as to the burning of the Hand, agree the Books of 5 Co. 110. a. *Heston's Case*, *Hob.* 292. and *Hob.* in *Cuddington* versus *Wilkins*. But *Moor* 872. says, Justice *Nichols*, was of Opinion, that if the Plaintiff had been convicted, the Judgment would have been otherwise. But *Castlemain* was found Not guilty on the whole Matter.

Robbery.

Upon the Statute of *Huy and Cry*, at a Trial some House-keepers appeared as Witnesses, that lived within the Hundred, who being examined, said they were poor and paid no Taxes or Parish Duties. And the Query was, whether they were good Witnesses? *Twisden* went down from the Bench to the Judges of the Common Pleas for their Opinions, who said, Judge *Wylde* was confident that they ought not to be sworn, but Judge *Tyrrel* doubted, but after was of the same Opinion, because when the Money is recovered against the Hundred to be levied, they might be worth something, *Mich. Rep.* 74.

Parishioner.

It was held in the Case of *Meredith* against the Hundred of *Watlington*, *Pasch.* 1657. That a Parishioner is not a competent Witness to prove the Bounds of a Parish where he is an

Inha-

Inhabitant, although he pay neither Scot nor Lot, but receives Alms of the Parish, because he is subject to the Watch and Ward, and so is concerned something, though not so much as others, *Sty. N. P. R.* 571, 572.

If one be attainted of Felony and pardoned, **Pardon.** he cannot be either Juror or Witness. *Contra Felons.* *per Coke.* 2 *Bulstr.* 154. *Brown and Crashaw.* Nor can a Recusant Convict be a Witness, for **Excommu-** he is a Person excommunicate, **Co.** **nicate.**

In an Information against P. That whereas he hath cheated one Lee in a Match, to the Intent that the Lands of this Lee should be charged before Marriage, he procured the Feme to acknowledge a Judgment to him, where in Truth no Debt was due by the Feme; in this Case the Feme was admitted a Witness for the King, though the Profit of the Husband was collaterally concerned; for by this Evidence, if it be found against P. the Judgment shall be set aside. *Mich.* 21 *Car.* 2 *B. R.* The King against *Paris.* Feme Covert.

A Trustee may be a Witness if he release his Trust; so if he be in Possession of the Lands in question as Servant. *Siderfin* 315. **Trustee.**

In an Information of Forgery for publishing a forged Deed, importing the Revocation of a Will, to the Prejudice of the Executors and Legatees; 'twas resolved by all the Barons of the Exchequer, upon Conference with the Judges of the King's Bench, 1. That a Trustee who has conveyed over his Estate in Trust, or has assented thereunto, cannot be a Witness for the King in this Case; nor nor can a Legatee, nor any other Person that is a Loser by the Deed, or may receive any Advantage by the Verdict's being found for the King, *Hardres Rep.* 331. *Not's Case.* **Trustee.** **Legatee.**

But in Deceit for forging a Will, a Legatee was allowed and sworn as a Witness in the Trial for Forgery ; for this makes nothing to the Probate of the Will, or Recovery of the Legacy in the Spiritual Court, nor do they take Notice of it.

Usury.

Per Twissden 22 upon an Information upon the Statute of *Car. 2. B. R.* Usury, the Person who borrows the Money may be a Witness after he hath paid the Money, but not before. *Mich. 22 Car. 2. B. R. per Twissden* Justice.

Perjury.

Prosecutor.

If *A.* indite *B.* on the Statute 5 *Eliz. c. 9.* of Perjury, as a Party grieved, the Prosecutor cannot be a Witness against *B.* *Roll. 685. 2 Part.*

Perjury.

Judgment staid, because the Verdict was laid upon the Testimony of one Witness, and he since convict of Perjury in the same Thing. *Pas. 17. Car. 2. B. R.*

Two Witnesses.

There ought to be two, where the Trial is by Witnesses.

Juror.

In *Bennet's Case, Style 223.* In a Trial at Bar, it was said by the Court, That if either of the Parties to a Trial desire that a Juror may give Evidence of some Things of his own Knowledge to the rest of the Jurors, that the Court will examine him openly in Court upon his Oath, and he ought not to be examined in private by his Companions. And it was also said, That if a Robbery be done *in Crepusculo*, the Hundred shall not be charged ; but if it be done by clear Day-light, whether it be before Sun-rise, or after Sun-set, it is all one, and the Hundred shall be charged.

Robbery.

One *A. B.* was indicted of High Treason, in conspiring the Death of the King, and was brought to his Trial at the Bar this Term, and one *D.* being produced a Witness against him the said *A. B.* excepted against him; for that the said *D.* had been outlawed of Felony, and burned in the Hand, and produced the Record: The Witness to clear himself thereof produced the King's Pardon, whereby he was pardon'd of the said Crimes, Outlawry, &c. The Prisoner still objected, That the Pardon did not restore him to his Credit; and that notwithstanding he was no legal and competent Witness, and prayed that he might have Counsel assigned him to argue the Point, which was granted: And the Court having heard his Counsel, and conceived some Doubt in the Matter, they desired Mr. Justice *Raymond* to consult with the Judges of the Common Pleas, to which Court *Raymond* immediately went, and at his Return reported to this Court, the Opinion of the said Judges to be, that he might be sworn: But if a Man convicted of Perjury were afterwards pardoned, yet that would not enable him to be a Witness, because it seemed to be an Injury to the People, to make them subject to the Testimony of such a one. *Vide Hob. 81.* Pardon takes away *Penam & reatum*; so *D.* was sworn. *Anonymus, 1 Ventr. 349.*

Felons pardoned may be Witnesses; not perjured Persons.

An Information was brought against him, for that he *fraudulenter & deceptively* procured one *Anne Wigmore*, to give a Warrant of Attorney to confess a Judgment. To this he pleaded Not-guilty, and upon Trial it was debated, Whether she might be admitted to give Evidence against the Defendant? For if he were convicted, the Court said they should

One admitted an Evidence of a Fraud upon her self.

set aside the Judgment. Nevertheless, she was sworn by the Opinion of three Judges, against *Twisden*, this Suit being for the King, *Paris's Case*, 1 *Ventr.* 49.

Witnesses for Prisoners to be sworn.

By 1 *Annæ*, cap. 9. Witnesses for Prisoners upon Trials of Treason or Felony, shall be sworn as Witnesses for the Crown are, and be subject to like Punishment for Perjury.

Inhabitants may be Witnesses concerning Highways and Bridges.

By 1 *Annæ*, cap. 18. It is enacted, That in all Informations and Indictments in any Court of Record at *Westminster*, or at the Assizes or Quarter-Sessions, for not repairing their Highways or Bridges, the Evidence of the Inhabitants of the Town or County in which such decayed Bridges or Highways lie, shall be admitted.

Quaker falsifying on his Affirmation, to be punished as for wilful Perjury.

By 7 & 8 *Wil.* 3. cap. 24. it was enacted, That every Quaker who shall be required to take an Oath on any lawful Occasion, instead of the usual Form, shall be permitted to do it in the Form prescribed by this Act: And if he shall be convicted of having done it falsely or corruptly, he shall incur the same Penalties, as other Persons convicted of wilful Perjury: But that no Quaker or reputed Quaker, should be qualified to give Evidence in any criminal Cause by Virtue of this Act.

Quaker disabled to give Evidence in criminal Causes.

Witnesses to prove a nuncupative Will.

By 4 and 5 *Annæ*, cap. 16. it was enacted, That such Persons as are deemed good Witnesses in Trials at Common Law, should be deemed good Witnesses to prove a nuncupative Will, or any Thing relating thereto.

Commissioners for Trial of Prisoners, Witnesses.

Persons in Commission for the Trial of Prisoners for High Treason, were allowed to be good Witnesses, and they came off the Bench, and gave Evidence accordingly, *Kelynge* 12. Witnesses may be examined apart by the

the Direction of the Court, 2 *Inst.* 131. *Guiliems & Ux' versus Hulie. & Ux'.*

The same Persons who are Witnesses to the Indictment in Treason, may be Witnesses at the Trial, *Kelynge* 18. If a Conspirator be examined before a Privy Counsellor, or a Justice of Peace, and upon his Examination without Torture confess the Treason, and this be proved by two Witnesses at the Trial; in this Case, there needs no other Evidence to prove him guilty of the Treason, *Kelynge* 18.

Witnesses to the Indictment, Witnesses at the Trial.

Confession allowed Evidence.

Quare, if not altered by 7 *W. 3. cap. 3.* By which Statute, unless the Party confess the Fact in open Court, two Witnesses are required to convict him there.

Confession to convict one of Treason, must be in open Court.

Persons *Non sane* or interested, cannot be Witnesses.

At the Sessions at the *Old-Baily*, 7 Dec. 1664. Exception was taken to a Witness, because he had been burnt in the Hand for Felony. But *Hyde* Ch. Justice, *Kelynge*, and *Wylde* Recorder, held that to be no Exception; and in Civil Causes such Persons are frequently admitted Witnesses: That it differs from cutting off Ears, standing in the Pillory, &c. because those Punishments make the Person infamous, but burning in the Hand does not so, because it comes in the Place of Purgation at the Common Law, which supposeth he might be not guilty notwithstanding the Verdict; and therefore at the Common Law, he that confesseth a Felony, could never be admitted to his Purgation; for there could be no Presumption of not guilty against his own Confession, *Kelynge* 37, 38.

Person burnt in the Hand allow'd a Witness.

Wicks versus Smallbrook, *Mich.* 13 Car 2. B. R. Exception was taken to a Witness, for that he was convicted of Perjury, and they offered the jury.

Pardon cannot restore him to be a Witness.

Copy of a Verdict, (whereupon there had never been any Judgment,) in the Time of *Oliver* the Protector; but the Court would not receive or allow of it, because all is gone and discontinued by the Alteration of the Government. But they agreed, That Evidence to prove him perjured, might now be given *Viva voce*; and those of the other Side, to make his Testimony valid, produc'd a Pardon of the Perjury. But *per Cur.* That will not avail, for it cannot restore him to his Credit, 1 *Siderfin* 51, 52.

In *Crosby's Case*, *Aaron Smith* who had stood in the Pillory, and had the Advantage of a general Pardon afterwards, was allow'd to be a Witness, 5 *Mod.* 15. *Rex versus Crosby.*

Persons who have stood in the Pillory, whether they may be Witnesses.

Qu. If Persons convicted of framing a Libel, who have stood in the Pillory for it, may not be Witnesses; for the Disability seems to have respect to the Offence rather than the Punishment, *Rex versus Davis & Coster*, 5 *Mod.* 74.

Parties in the Crime may be Witnesses.

Persons guilty of the same Crimes (while they remain unconvicted) may be made Use of as Witnesses against their Fellows, *Kelynge* 17.

Wife married forcibly, a good Witness of it.

One who was taken and married by Force, was allowed to be a good Witness against the Offender, although she was his Wife *de Facto*, 1 *Ventr.* 243. *Brown's Case.*

Wife Witness against her Husband in a Rape on her by his Assistance.

In an Indictment against the Lord *Audley*, for assisting another to commit a Rape on his Wife, she was admitted a Witness against him, *Hut.* 115.

Men who claim under the same Title, shall not be Witnesses for one another, *Hob.* 91.

In

In the Case of the City of *London* concern- Members of
 ing the Duty of Water-Bailage, the Freemen Corporations
 of *London* were not allowed as Witnesses, sometimes,
 1 *Ventr.* 351. But there is no general Rule, allowed as
 where Members of Corporations shall be ad- Witnesses for
 mitted or refus'd to give Evidence, in Actions them, and
 brought by or against the Corporation, but sometimes
 every Case stands on its own Circumstances, not.
viz. Whether their Interest is so great, that it
 may be presumed to make them partial or not,
 2 *Lev.* 241.

In all Actions to be brought in the Courts Parishioners
 at *Westminster*, or at the Assizes, for Moneys may be Wit-
 mispent by the Churchwardens or Overseers, nesses of Mo-
 the Evidence of the Parishioners (other than ney mispent
 such as receive Alms) of the Parish where the by Church-
 Defendant are Inhabitants, shall be taken and wardens, &c.
 admitted, 3 & 4 *W. & M. cap.* 11.

In an Information against the Defendant for Indictment
 a Cheat, upon Trial the Fact appeared to for a Cheat
 be, that he had a Promise of a Note for 5 *l.* in procuring
 from his Mother-in-Law, and by some Slight a Note from
 got her Hand to a Note of 100 *l.* *Et per Holt,* H.
 Ch. J. The Mother cannot be a Witness being H. was not
 concerned in the Consequence of the Suit, allowed a
 which is a Means to discharge her of the Witness.
 100 *l.* for tho' the Verdict upon this Information
 cannot be given in Evidence in an Action up-
 on the Note for the 100 *l.* yet we are sure to
 hear of it to influence the Jury; and he said
 he could not distinguish this from the Cases
 of Perjury or Forgery, where the Party
 whose Interest is defeated or prejudiced by the
 Deed, &c. is no Evidence to prove the Per-
 jury or Forgery, *Rex versus Whiting, Salkeld*
 283.

A Goldsmith's Note is Evidence of his re-
 ceiving Money, *ibid.*

One who
was cheated
admitted to
prove the
Fact in the
Indictment.

Indictment for a Cheat done to J. S. by imposing upon him a Quantity of Beer mix'd with Vinegar, and Grounds of Coffee for Port-Wine; one of the Defendants pretending to be a Broker, and the other a *Portuguese* Merchant, for the better carrying on of the Cheat. *Et per Holt Ch. J.* J. S. was allow'd to be a Witness to prove the Fact upon the Trial; for in such private Transactions, nobody else can be a Witness of the Circumstances of the Fact but he that suffers, *Regina versus Mackartney, & al', Salkeld 286.*

Evidence in
an Action for
running over
the Plaintiff's
Barge with a
Ship.

In an Action on the Case for managing the Defendant's Ship so negligently that it ran over the Plaintiff's Barge, the Declaration set forth, That he was possessed of the said Barge, laden with divers Goods and Merchandizes. And 1. *Holt Ch. J.* would not suffer the Pilot to be a Witness, because he was answerable, if faulty in steering, to the Master. 2. He would not suffer any Damages to be recovered for the Goods, because not set forth particularly, saying they ought to be set forth specially; as where an Action is brought for burning his House: So in Case, for Words, *per quod* she lost her Marriage with J. S. & *aliis personis*, he said, he would not suffer them to give in Evidence a Loss of Marriage with any Body but J. S. *Martin versus Hendrickson, Salkeld 287.*

Son took the
Father's Mo-
ney, and gave
it to H. and
the Son's E-
vidence ad-
mitted in
Trove against H.

In Trover for Money, the Case was upon Evidence, That the Plaintiff's Son had a general Authority from his Father, to receive and pay out his Father's Money. The Son took a Bill for Money due to his Father, and received it without a particular Authority for that Purpose; and this Receipt was with an Intent to imbezil and spend it; but he gave a Receipt

ceipt as for Money had to his Father's Use, and this Money was given to the Defendant. The Questions were, 1. If the Son could be a Witness in this Case to prove the Delivery? And 2. Whether the Father could maintain an Action of Trover? *Holt Ch. J.* was of Opinion, That the Son might be admitted as as a good Witness, his Testimony being corroborated by other Circumstances. And that the Action was maintainable for the Father, for that the general Authority the Son had to take his Father's Money, made the Receipt of the Money to be to his Father's Use, and a good Discharge of the Debt, so as the Father could not avoid the Payment, and charge the Person that paid the Money with an Action: And then if the Payment was a good Discharge, it is Reason it should be his Money, and the Possession of the Son is the Possession of the Father, the Son being to this Purpose as his Father's Servant: And according to this Opinion the Plaintiff had a Verdict, but he said he was willing to have a Case made of it; but the Defendant acquiesced in his Opinion, *Anonymus, Salkeld, 289.*

The Plaintiff brought an Action upon a *Quantum meruit* against the Defendant, for that he at his Request had served him as a Commissioner in a certain Commission out of the Exchequer, directed to him and others for Examination of Witnesses: After Verdict on *Non assumpsit*, *Tremaine* moved in Arrest of Judgment, That the Plaintiff acted by Command of Court, and could not therefore take a Promise of Reward for the Service, no more than a Sheriff or Bailiff; *sed non allocatur*, for he is appointed at the Nomination of the Party,

Quantum meruit lies for serving as a Commissioner on a Commission to examine Witnesses.

Of Evidence relating to Executorship, Ch. 15.
 Party, who ought to pay him if he employs him, *Stockhold versus Collington, Salkeld. 330.*

Of Evidence relating to Executorship, Wills and Administrations.

Plene administravit.
Pedigree.

An Account given to and allowed by the Ordinary, is not good Evidence ; nor a Pedigree by a Herald at Arms, to prove an Heir, but it must be proved by Deeds, Records, or Witnesses.

Devastavit.

In Debt against an Executor, suggesting a *Devastavit*, any Evidence that proves Assets, is not sufficient, but an actual *Devastavit* must be proved ; for now the Party is chargeable in his own Right, *Keble, 2 Part, 676.*

Assets.

Upon *Plene administravit*, if it be proved that the Executor hath Goods of the Testator's in his Hands, he may give in Evidence, That he hath paid of his own Money for the Testator, to the Value of these Goods, *Co. Lit. 283. Dyer 2.*

The Plaintiff may say, he sold the Land by the Appointment of the Testator, *3 H. 6. 3.*

Assets.

If the Issue be in a Suit against an Executor, Administrator or Heir, Assets in *London*, to prove Assets in another Place, is sufficient, *Lib. 6. 47. Dyer 271.*

Plene administravit. But an Outlawry of the Testator is Evidence upon *Plene administravit, Keble, 2 Part, 745.*
Debt for Rent.

Upon *Plene administravit*, the Executor cannot give a Judgment in Evidence, *Keilw. 59.* nor Payment of Debts by Contract, in Debt brought upon an Obligation. A Cup pawned and redeemed with the Executor's own Money, is good Evidence ; but a Recovery ought to be pleaded ; upon *nil debet*, in Debt for Rent, That the Lessor entred into Part of the Land,

is no good Evidence, *Goldf. 81.* But *non demissis* is, 9 H. 7. 3.

In Case against an Executot; whereas the Executor. Testator was indebted to the Plaintiff, the Executor promised to pay the Debt, in Consideration the Plaintiff would forbear to sue him; the Executor may give in Evidence upon *Non assumpsit*, that there was no Debt, or that he had no Assets *tempore promissionis*, for then there would be no Consideration, *Lib. 9. 94. William Bane's Case.* Upon the Issue *ne unques Executor* to prove an Administration granted to him, is good Evidence, *Dyer 305.*

In Trover brought by an Executor, the Defendant pleaded *ne unques Executor.* The Defendant shall not give in Evidence that the Will was forged, because the Will was under the Seal of the Ordinary, to whose Examination it belongs, as to Goods; but Forgery of the Probate, or a Revocation, may be given in Evidence, because these Things are in Affirmance of the Spiritual Proceedings; so of an Administration, that there are *bona notabilia*, may be given in Evidence, but not *Non compos mentis*, *Siderfin 359. Keb. 2 Part, 337.*

Ne unques Executor. Spiritual Courts.

That the Executor paid a Legacy, is Evidence that he had Assets.

Will, The Probate is good for the personal Estate, but not to prove a Will in Writing of Land by the Statute.

What shall be given in Evidence, and what is good Evidence.

If in the Evidence it appear that the Bill was filed afterwards, nothing that the Defendant had in his Hands, and paid before the filing of the Bill, shall be Assets; for otherwise there might be great Inconvenience.

Upon this Plea the Executor may give in Evidence a Retainer for a Debt due to himself of as high a Nature; or Payment of Debts

plene administravit.

Debts with his own Money, and that he kept Goods of the Testator in lieu; for this alters the Property.

The Original need not be shewed in Evidence upon this Plea; nor upon the Issue Assets at the Day, &c. because the Day is agreed in pleading, yet see *Siderfin* 462.

Pasch. 2 Cor. 2.
B. R. 68. Novel
verfus Wilfor.
Will.

Agreed by the whole Court, that if in Evidence the Executor give in Evidence the Probate under the Seal of the Ordinary, nothing can be given to the contrary that he is not Executor; for Causes Testamentary belong entirely and originally to the Ordinary; and if the Will be forg'd the Suit ought to be in the Spiritual Court to repeal the Probate, according to 4 H. 7. 12. So of Letters of Administration, it cannot be alledged that there was a Will; but if there be a Suit, it must be in the Spiritual Court to repeal it. Yet some Books seem to the contrary, as *Fitz. Estoppel* 9. *Bro. Testm.* 4. 22 H. 6. 52. 21 E. 4. 50. a. *Com.* 282. 9 Co. 31. a. *Old Entries* 325. 1 *Brownl.* 79. Also upon Evidence it may be proved that the Probate or Letters of Administration were forged.

Administra-
tion.

In Debt by an Administrator upon an Obligation, the Defendant pleads *Non est Factum*, the Plaintiff in Evidence need not to shew the Letters of Administration, for this is admitted by the Defendant's Plea of *non est Factum*.

Where Plaintiff or Defendant is Administrator, if the Letters of Administration bear Date after the Action brought, that is well enough.

Will.

A Will under which a Title to Land is made to the Plaintiff, must be shewn it self to the Court, and the Probate it self is not sufficient,

cient, 1 *Keble* 117. *Trial per Pais* 215. The same Case cited 2 *Roll.* 678. between *Bret* and *Bret*, 10 *Car.* 1.

The Copy of a Will according to the Book *Pasch.* 1651. of the Register in the Court Christian, shall Will. not be admitted to prove a Will of Lands, except the Possession has gone a long Time accordingly.

2 *Roll.* 678. adjudged, That Probate of a Probate. Will by Witnesses for Lands, is not Evidence at Common Law, although the Probate was good as to the personal Estate devised: Between *Bret* and *Bret*, *Hill.* 10 *Car.* 1.

Upon *Plene administravit* pleaded, the Ac. *Plene Admini-* count given to the Ordinary, shall not be gi- *stravit.* ven in Evidence, nor any respect to it, 2 *Roll.* 678. *Turvie's Case*, *Pasch.* 7 *fac. per. Cur.*

Debt against an Executor, upon *Plene admi-* *Plene admi-* *nistravit*, it appeared that the Executor med- *stravit.* dled and administred, and then refused in Court, and Administration was granted to another; and that several Sums were recovered against the Administrator; it was said by *Periam* Justice, 1. That if an Administrator (who is a Stranger) administer, without the Commandment of the Executor, the Executor cannot give such Administration in Evidence to prove his Issue. 2. That in the principal Case, the Executor having administred he could not refuse, and so the Administration is granted without Cause, and what he did was without Warrant, and no Administration, *Leon* 134. *Hawkins* and *Lawse* Case. At *Bury* Assizes, 1682. before Judge *Wyndham*, The Executor gave the Administration of the Administrator in Evidence, and allowed; but there what the Administrator did, was by the

Plene administravit.

the Executor's Consent. In Mr. *Lun* and his Mother's Case.

An Executor pleads *plene administravit* prater a Judgment : Repliation and Issue, that the Judgment was fraudulent. The Obligee who had the Judgment

was denied to give Evidence about his Debt, for he sweareth to have Assets for himself, and is interested in the Thing. Before Judge *Wyndham* ; at *Bedford* Assizes, 1682.

An Executor *de son Tort* cannot give in Evidence his retaining of Goods to pay himself, for he cannot retain ; but if he take out Letters of Administration, although, *pendente lite*, he may retain for a Debt of as high a Nature, and plead this in Bar ; for the Administration purges his Wrong ; and although he shall not abate the Writ by taking out Letters of Administration, yet he may plead this in Bar, *Style's Reports* 338.

Assets.

In Debt against Executors, and Assets *inter manus* in Issue, 'tis good Evidence that they sold Land, by the Will of the Testator, &c. and that they had the Money paid, so that they recovered Damages in Trespass for Goods taken in the Life of the Testator, &c. 3 *H. 6.* 3.

Trover by Administrator on the Intestate's Possession, Defendant cannot give in Evidence a Will on the general Issue.

Otherwise, if on the Administrator's own Possession.

The Plaintiff brought Trover as Administrator, and declared upon the Possession of the Intestate ; and upon Not guilty pleaded, at the Trial the Counsel for the Defendant offered to give in Evidence, that the pretended Intestate made a Will and an Executor. But *Holt* Ch. J. over-ruled it, and took this Diversity, That where an Administrator brings Trover upon his own Possession, the Defendant may give in Evidence a Will, and an Executor upon Not guilty : Otherwise if it be on the Possession of the Intestate, (as in the principal Case,) for there the Defendant ought to plead it in Abatement ; and if he

does

does not, he shall not give it in Evidence, *Blainfield versus March, Salkeld 285.*

In an Action on the Case for Money had and received to the Plaintiff's Use; upon the Evidence it appear'd, That the Plaintiff's Wife was Executrix, and that the Money was paid to the Defendant as due to her; and the Plaintiff was nonsuited, because the Action ought to have been brought by Husband, and Wife as Executrix; for it being paid without any Authority from the Husband, it remains as a Debt due to the Executrix, and if the Husband dies, the Wife may bring an Action for it: But if the Money had been received by Authority from the Husband, then it had been as his Receipt, and as his Money, and the Action might well have been brought in his Name; and the Money would have been Affets in her Hands, *Anonymus, Salkeld 282.*

In an Action upon the Case against an Executor, upon *Plene administravit* pleaded, three Points were declared *per Holt Ch. J.* 1. That the Plaintiff must prove his Debt, otherwise he shall recover but a Penny Damages, though there be Affets; for the Plea only admits the Debt, but not the Quantity. 2. That all separate Debts mentioned in the Inventory, shall be counted Affets in the Executor's Hands; for that is as much as to say, they may be had for demanding, unless the Demand or Refusal be proved. 3. That in Strictness no Funeral Expences are allowable against a Creditor, except for the Coffin, ringing the Bell, Parson, Clerk and Bearers Fees, but not for Pall or Ornaments, *Shelley's Case, Salkeld 296.*

Payment of Money due to the Wife as Executrix, is not Evidence to maintain Action for Money received to Husband's Use.

Evidence upon *Plene administravit.*

Ordinary
cannot refuse
probate to
an Executor
because *Inc.*
capax.

A *Mandamus* issued to grant Probate of the Will; the Ordinary returned, That the Executor was an absconding Person, *Incapax, &c.* And this Return was held insufficient, for that there is a Will is admitted; and since the Testator has thought the Executor a proper Person to be intrusted with his Affairs, the Ordinary cannot adjudge him otherwise upon a Disability by the Canon Law, for that is not admitted here, but as far as it has been received from Time immemorial. *Per Holt Ch. J.* and a peremptory *Mandamus* was granted: Neither can the Ordinary insist upon Security from the Executor; for the Testator has thought him able and qualified, and he has a temporal Right, which he cannot sue for before Probate: And there have been no Precedents or Practice of this Nature: The King versus *Raynes, Salkeld 299.*

If an Executor confesses or suffers Judgment by Default, he admits Assets in his Hands, and is estopped to say the contrary, *Salkeld 310.*

Executor
pleading
Judgments
with Penalties
should
shew how
much is really
due.

In Debt upon a Bond against an Administrator, he pleaded several Judgments, *& riens ultra 5 s.* which was found; The Plaintiff as to one Judgment replied, there was but so much due, which the Debtee was willing and ready to accept in full, and that the Defendant by Fraud deferred the Payment of that Money, and the Judgment was kept in Force to defraud the Creditors, and replied the same Matter as to another Judgment, and demurred as to the rest. The Defendant rejoined that as to one Judgment, it was not kept on Foot by Fraud, *&c.* and as to the other, no Assets *ultra* so much, which was liable to the Judgment; and so to the third;

and as to the rest joined in Demurrer. *Et per*

Cur. 1. The best way for an Administrator to plead, is to plead truly and honestly; and though there is a Judgment for a Penalty, he ought to plead the Judgment, and shew how much is due. 2. If he pleads several Judgments, and any one Judgment be ill pleaded or found fraudulent, the Plaintiff shall have Judgment. 3. If an Administrator plead

Pleading of Judgments is a Confession of Assets to satisfy them, and the *riens ultra* a certain Sum is not material.

twenty Judgments, 'tis a Confession of Assets to satisfy the twenty Judgments, and the *riens ultra* 5 s. is but Form, not material nor traversable. 4. If a Judgment being pleaded, and *per fraudem* replied, Issue is take thereupon, and by Evidence it appears the Debtee was willing to take less than is recover'd, 'tis Evidence of Fraud: But if it be shewed that the Administrator had not Assets to pay that Sum, it is no Fraud. 5. If an Administrator pleads two or more Judgments, and the Plaintiff confesses the Plea to be true, and prays Judgments of Assets *in futuro*; if afterwards Assets came to his Hands, he may satisfy the Judgments pleaded, for the Judgment of Assets *de futuro*, is only to be paid off after the other Judgments are satisfied; and therefore there is no Inconvenience in making the pleading of fraudulent Judgments a Confession of Assets. 6. The Conclusion of the Replication, with *hoc paratus est verificare*, to every Judgment, is well; but a general Conclusion to the whole had been better. *Vide 2 Saund. 338. Salkeld 311. Parker versus Atfield.*

A Woman by Deed settled her Estate in Trust, reserving a Power to her self to give by her last Will and Testament, as she should think fit, so much of her Estate in Legacies; and this was done before Marriage, with the

Will made by a Wife in Pursuance of a Power reserved before Marriage, is not properly a Will, nor provable by the Ordinary.

Consent and Privity of the intended Husband, who refused nevertheless to be a Witness or Party to the Deed: The Marriage took Effect. The Wife made a Will and died, and the Executors proved the Will. *Et per Holt Ch. J.* This is not a Will, neither ought the Ordinary to prove it; if he does a Prohibition lies. Where a Woman is Executrix and marries, there she may make a Will with Consent of her Husband, and cannot without, 1 *Jon.* 157. So if a Woman having Debts due to her, marries, she may make a Will *quoad* these, and the Ordinary may prove it. In other Cases she cannot, for 'tis only a Writing in Form of a Will: However, in the principal Case, it appearing that the Ordinary had only granted Administration, *quoad* the Goods in this Will, 'twas allowed as reasonable, *Cro. Car.* 219. *Shardelow versus Naylor, Salkeld* 313.

Two Executors join in an Acquittance, but one only receives the Money; both are chargeable, for it to Creditors; but the actual Receiver only to Legatees.

Sir Charles Hopson made *Churchill* and *Goodwin* his Executors, Men of good Credit: *Goodwin* being a Banker received all the Money, but *Churchill* joined with him in the Receipts, taking his Note to shew that he received not the Money. *Et per Harcourt* Lord Chancellor, If two Trustees join in a Receipt, and one receives the Money, he only that receives shall be liable; if there be two Executors, and they join in a Receipt, and one only receives the Money, as to Creditors, who are to have the utmost Benefit of Law, each is liable for the whole, though one Executor alone might give a Discharge, and the joining of the other was unnecessary; but as to Legatees and those claiming Distribution, who have no Remedy but in Equity, the Receipt of one Executor shall not charge the other; for the joining in the Receipt is only

only Matter of Form, the substantial Part is the actual receiving, and this only is regarded in Conscience, *Churchill versus Hopson, in Canc. Salkeld 318.*

Of Evidence by Records, Books, Deeds, and other Writings.

If the Issue be a Recognizance or not, a Recognizance with a Defeazance is good Evidence, *Plo. 14.* So of an Agreement, a special Agreement will prove it, *Plo. 8.*

A Licence to alien Land, or a Pardon for Tenure in Alienation of Land, was held by a common Presumption, to be a good Proof that the Land was held in *Capite.*

Ancient Deeds may be given in Evidence, although the Execution of them cannot be proved.

An ancient Deed found in the Archives of the Dean and Chapter, given in Evidence to prove the Endowment of the Vicar, though it appeared never to be sealed or delivered, *Keble, 2 Part, 126.*

He that takes out a Copy of Part of a Record, must at least take out so much as concerns the Matter in Question, or else the Court will not permit it to be read.

If one produce a Lease made upon an Outlawry, in Evidence to a Jury to prove a Title, he must also produce the Outlawry itself.

To prove a Feoffment, a Deed of Feoffment is shewed, but no Livery is indorsed, if Possession has gone with the Deed, it is good Evidence, *Roll. Rep. 1 Part, 132.*

Provifo.

Upon Not guilty to an Information upon a penal Law, a Provifo to excuse him may be given in Evidence, *Jones Rep.* 38.

Nondecimando.

If a Man prescribe in a *non decimando* generally, he cannot give a Bull in Evidence, *Palmer's Rep.* 38.

Deed.

A Deed with the Seals torn off was admitted to declare Uses, *Palmer's Rep.* 403, 405.

Records.

Records prove themselves, and cannot be proved by Witnesses; but Copies of them must, and are good Evidence; and so may any Thing done in the County-Court, Court-Baron, or Hundred-Court, &c. be proved by Witnesses.

A Copy of a Conviction upon an Indictment of Trespafs, &c. shall not be admitted Evidence singly by it self in an Action of Trespafs, &c. but with Evidence it shall.

Fine.

A Fine, or Common Recovery, may be given in Evidence, though it be not under the Great Seal, or Seal of the Court, and without vouching the Roll of the Recovery; and the Part indented is the usual Evidence that there is such a Fine, though they which saw the Fine, are also good Evidence, *Plow.* 410. *Style* 22.

When a Writ out of a Court of Record is only Inducement to an Action, the taking out the Writ may be proved without Copy of it; for it is not of Record till it be returned. And so I think it may to prove the Point in Action, by Witnesses, or Notes of it in a Book of Entries, &c.

Bevis against Holloway.

Summer Assizes, 1683. before View in Escape upon a Judgment, and *Ca. sa.* in the Court of the Dean and Chapter of *Peterborough*, being an inferior Court of Pleas, the Plaintiff was nonsuited because he had not

not a Copy of the Plaint nor Judgment, but only the short Notes of the Book of the Court.

Aliter in Court-Baron, &c.

So if a Lease be pleaded, a Lease upon Lease. Condition is good Evidence, 1 H. 8. 20. because the *Genus* comprehends the *Species*. So of a Feoffment pleaded, a Feoffment upon Condition, or a Fine which is a Feoffment of Record, is good Evidence, 44 E. 3. 39. A Special Agreement is Evidence for an Agreement, *Plow.* 8.

But if a Feoffment be pleaded in Fee, upon Feoffment. Issue *non feoffavit modo & forma*, a Feoffment upon Condition is no Evidence, because it doth not answer the Issue; and wheresoever Evidence is contrary to the Issue, and doth not maintain it, the Evidence is not good, 11 H. 4. 3. *Feoffments* 41. A Grant in Reversion is no Evidence, but a Lease and Release is, 20 H. 7. 5. If the Indorsement be of a Livery by Attorney, the Letter of Attorney must be shewed.

To prove the Sealing and Delivery of a Deed, and not know the Party that did it, is not good Evidence; but if he knows the Party upon Sight of him, it is good enough, *Keilw.* 59.

A Shop Book no Evidence after a Year, *Shop. Books.* 7 *Fac. cap.* 12.

Upon Issue Affets or no Affets, or seized Covin, or not seized, if one give a Feoffment, &c. in Evidence, Covin may be given in Evidence, by the other, but not if the Issue be infeoffed or not infeoffed; for it is a Feoffment *tiel quel*, though made by Covin, *Lib.* 5. 60. *Hob.* 72.

Voluntary
Conveyance.

A voluntary Conveyance is not fraudulent, because voluntary, but 'tis Evidence of Fraud against an after Purchaser *bona fide*; the Statute avoids such Deeds as are *bona fide* and on Consideration, if made *ea intentione* to defraud Purchasers, therefore this Fraud must be found by the Jury, *Keb. 1 Part 486.*

Doomsday-
Book.

The Book of Domesday brought in Court, is good Evidence to prove the Land to be ancient Demeſne, *Hob. 188.*

Court-Rolls
for Copy-
holders.

Recoveries
are some Evi-
dence that
the Manor
bears an In-
tail of a Co-
pyhold, but
to shew that
Remainders
(after an E-
state-Tail
spent) to be
enjoyed, is a
better.

Copies of the Court-Rolls, are the only Evidence for Copyholders, for (as *Littleton, Sect. 75.* tells you) they are called Tenants by Copy of Court-Roll, because they have no other Evidence, concerning their Tenements, but only the Copies of Court-Rolls. But *Coke* explains the Text, and says, This is to be understood of Evidences of Alienation; for a Release of a Right by Deed, a Copyholder (that cometh in by way of Admittance) may have, and that is sufficient to extinguish the Right of the Copyholder which he that maketh the Release had.

Statutes.

Pardons.

General Acts of Parliament may be given in Evidence, and need not be pleaded; and so may general Pardons given by Parliament, if they be without Exceptions; but commonly Advantage of the Act is given by the Act it self to the Offender, without pleading it, as by the late (most truly so called) general Act of Indempnity, every Person thereby pardoned, may plead the general Issue, and give the Act in Evidence, for his Discharge: Which are general, and which particular Statutes, See *lib. 4. 76.*

A private Act may be given in Evidence exemplified under the Great Seal, or a Copy of the Record; but a printed Copy is no Evidence

dence unless it be proved, it ought to be pleaded, but the Jury may find it, *Dyer* 239.

Inspection of a Deed inrolled may be given in Evidence, *Contr.* of a bare Deed not inrolled, or of a Deed that needs no Inrolment *Pasch* 1655. B. R. *Goodson's Case*.

An *Inspeximus* lieth only of Matter of Record, and not of a private Deed, *Keble*, 2 Part, 294.

A Deed to lead the Uses of a Fine was inrolled on the Acknowledgment of but one of the Parties to it, and was allowed by *Glyn* Chief Justice, in Evidence, as *Rolle* Chief Justice had done before him, though no binding Evidence, *Turbet* vers. *Maddison*, *Pas.* 1655. B. R.

An Office found at a Death, &c. may be given in Evidence.

A Verdict against one, under whom either Plaintiff or Defendant claims, may be given in Evidence against the Party so claiming. *Contra* if neither claim under it, *Duke* and *Ventres*, *Mich.* 1656. B. R.

If an Action be brought on a Statute, which has several Provisoes in it, the Defendant may plead Not guilty, and aid himself by any of the Provisoes in Evidence; but if *Provisoes* be made to that Statute, of which the Defendant may take Advantage, he ought to plead it, and not give it in Evidence, *per Roll* Chief Justice, *Mich.* 1650. B. R. *Jones* 320. *Accord.*

Arrest and Imprisonment to prove a Bank- Bankrupt.
rupt must be proved by Record, *Newby* versus *Bathurst*, *Pasch.* 1659. B. R. In a Trial at Bar, what Evidence proves a Bankrupt, *Keble* 2 Part, 487.

Records, as Patents, Statutes, Judgments, may be given in Evidence, *Hob.* 227. *contr.* to *Dyer* 129.

To prove an Extent upon a Statute or Judgment, you must prove a Copy of the Statute and Judgment, as well as the Copy of the Writ and Extent.

When Records are pleaded, they must be *sub pede Sigilli*, *contr.* if given in Evidence, *Style 22. White's Case.*

A Copy of a Deed, is good Evidence where the Defendant has the Deed, and will not produce it, *Per Vernon Justice, Clayton 15.*

So that there was a Revocation is sufficient for the Heir, without shewing the Deed it self, which was taken away by the Defendant, so that the Witnesses to the Release proved the Lease without shewing, being taken away by the other Side.

A Deed of Feoffment without Livery may be given in Evidence as a Release, *per Berkley, 11 Car. Clayton 32.*

If a Fine be given in Evidence, with five Years Non-claim, &c. the Fine must be shewed with the Proclamations under Seal, and the Chirograph will not serve.

A Deed cancelled by Practice, was allowed to be read in Evidence in Action under that Deed, the Practice being proved, *Hetley 138.*

Against a Purchaser *bona fide*, Recital in a Deed of Money paid is not sufficient, nor Acquittance for the Money, unless it be of ancient standing, and then it shall be presumed.

The Deed to lead the Uses of a Fine *sur concessit*, need not be proved *per Testes.*

If a Deed of Feoffment be shewn, but no Livery, Possession going with the Deed, is Evidence to a Jury to find Livery.

At

At Guildhall, Trin. 23. Car. 2. Hale Chief Justice cited the Case of Sir Paul Pindar, A *Lev. 11. 12.* was proved by a Recital of it in another Record, and Hale and Mainard demurred on the Evidence, and adjudged against them for this Cause, viz. That it was proved there was such a Record, that it was filed, that it was taken off the File. But (by him) generally without such Proof, the Evidence is not good, because one Record may recite one that never was.

Recital of other Grants by Letters Patent in Letters Patent, are some Evidence but not fit to be allowed, without shewing the former Letters Patents or a Copy. But the Jury may find them. Recital in Letters Patent.

The Proof of this Surmise in any Court of Record, shall not be given in Evidence in another Action, upon the same Custom, because the Defendant in the Prohibition cannot cross-examine. Surrender. Prohibition.

The Record of Conviction of Recusance being burnt, may be proved by the Roll of Estreats of the Clerk of Assize, signed by the Judge and delivered into the Pipe, or by other Evidence, as a *Fieri facias*, &c. may be proved by other Evidence. Recusant.

A voluntary Conveyance is not fraudulent, because voluntary; but it is a great Evidence of Fraud against a Conveyance made *bona fide*, and therefore this Fraud must be found by the Jury, *Keble 1 Vol. 486.* Fraud.

If the Issue be whether the King's Tenant by Letters surrendered to the King or not, the accepting of new Letters Patent, which is a Surrender in Law, is good Evidence. Surrender.

If an Imprisonment by Dures at D. be in Issue, 'tis not material whether he was ever Dures.
at

D. or not, for the Effect of the Issue is, if the Deed was made by *Dures*.

Feoffment.

So if a Feoffment pleaded by Deed, a Feoffment without Deed, or another Deed is good, for the Effect of the Issue is upon the Feoffment, not upon the *fait*.

Non demisit

modo & forma.

If in pleading an Indenture of Demise you mistake the Recital, and the Issue is *non demisit modo & forma*, the Mistake shall not hurt, for the Effect of the Issue is upon the Demise.

If the Date or Number of Years be mistaken, 'tis fatal.

Information.

Upon Not guilty, he may give in Evidence a Discharge by a Proviso in the same Statute, for thereby he is Not guilty *contra formam Statuti*, but not a Discharge by another Statute.

Upon *non habuit seu tenuit ad firmam contra formam Statuti*, the Parson may say, he took the Farm for Maintenance of his House, according to the Proviso in Debt upon the Statute of 21 H. 8.

But upon the Statute of 5 E. 6. for ingrossing, upon Not guilty, 'tis said, That the Defendant cannot give in Evidence a Licence according to the Proviso of the Statute, *sed quare rationem*.

Seisin. Feoffment.

In a *Scire facias* against Ter-tenants and a Feoffment pleaded before the Judgment, *absque hoc* that he was seized *tempore Judicii*, and Issue upon the Seisin, that the Feoffment was fraudulent, to defraud the Judgment, may be given in Evidence; but otherwise, if the Issue had been upon the Feoffment.

Ancient Writing.

An ancient Writing that is proved to have been found amongst Deeds and Evidences of Land, may be given in Evidence, although the executing of it cannot be proved; for 'tis hard

hard to prove ancient Things, and finding them in such a Place, by Presumption, they were honestly and fairly obtained and preserved for Use, and are free from Suspicion of Dishonesty, 24 Car. B.R.

A Copy of Part of a Record cannot be given in Evidence, unless 'tis proved that the Part shewed in Evidence, is all concerning the Matter in Question. Copy of Records.

A Transcript of a Record or Enrolment of a Deed may be given in Evidence, for they are Things to be credited, being made by Officers of Trust. Transcript, Enrolment.

If one produce a Lease made upon an Outlawry, to prove a Title, he must also produce the Outlawry it self: But if it be to prove other Matter, he needs not shew the Outlawry. And so it is of an Extent, without shewing the Statute or Judgment on which the Extent is grounded. Lease upon an Outlawry.

By *Rolle*, an Office found after the Death of a Tenant in *Capite* of Lands in another County, may be given in Evidence to try the Title of those Lands, if there was a special Livery granted unto the Heir. Office.

Upon a Motion there was a Rule made by Consent, That a Deed shall be allowed upon Evidence at the Assizes without proving of it, which was allowed because of the Consent. Sid. 269. Consent.

The Copy of a private Act of Parliament may be given in Evidence; and if upon Colateral Issue it is to be proved, that such a one was Justice of the Peace, or Baronet, &c. Common Reputation is sufficient Proof without shewing the Commission or Letters Patent of the Creation. Mich. 1650. Coram Rolt ad Guildhall, Littleton vers. Poins. Private Act. Just. of Peace.

Record.

Lawrence ver-
sus Key.

A Copy of a Record is not true, unless it be transcribed in the same Language, and therefore a Translation shall not be given in Evidence, as where the Record is in *Latin* and the Copy in *English*.

Copyhold.

A Copy of Copyhold Lands may be given in Evidence where the Rolls are lost, or not lost, *Mich. 15 Car. 2. B. R. Snow versus Cutler*.

Copy of a
Recovery.

A Copy of a Recovery after long Debate suffered to be given in Evidence, the Recovery it self being burnt. And *Hale* said, the

Exemplifica-
tion.

Exemplification of a Record under the Mayor of *Bristol's* Hand was allowed for Evidence, *Modern Rep. 217. Green and Proud's Case*.

On an old Recovery the Court allowed it, though no Tenant to the *Præcipe* could be proved, but it shall be intended, *2 Cro. 455. Mod. Rep. 117*.

A printed Copy of an Act of Parliament is not to be given in Evidence, if not examined by the Rolls and sworn.

Acts of Par-
liament.

A private Act that concerned *Rocheſter* Bridge, though printed by *Rastal* was not allowed in Evidence, not being examined by the Record. Otherwise of general Statutes, there the printed Book is good Evidence, *Lambert's Perambulation, Co. Rep. and F. N. B.* are good Evidence, *3 Keble 91*.

Book.

Crouch and
Drury, Pasch.
13 Car. 2. B. R.

A Man's Book of Accounts is no Evidence for the Owner of the Book, but for the adverse Party ; for his Book cannot be of better Credit than his Oath, which would not serve in his own Case, *Ergo*.

Copy.
Deed.

A Copy of a Deed is good Evidence where the Defendant has the Deed, and will not prove it, *per Vernon Justice, Clay. Rep. 15. Modern Rep. 4. 266. 2 Keble 483, 540. Moor 297*.

Copy of a Counterpart of a Lease, the ^{Copy.} Lease being lost, given in Evidence, and allowed, *Mich. 15 Car. 2. Stroud versus Dr. Holt,* B. R.

Though the Seals be broken off a Deed, ^{Deed.} yet the Deed may be given in Evidence, *Modern Rep. 11.* ^{Seals.}

Defendant claimed by Patent to *Vanlore* in ^{Patents.} *22 Jac. tot, talia, tanta, &c.* (as *Dyer*) the ^{Tot, talia, tanta, &c.} Duke of *Somerset*, or Abbey of *D.* had them; and though by way of Pleading a lawful Usage be sufficient, yet on Issue thereon, or in any Evidence it may appear that the Duke or the Abbey had a Substantive of *bona & cattalla Felonum*, by *Hale* Chief Justice, and the whole Court: For most Grants of Abbey Lands as these are Relative, and no Substantive Grants appearing, the other Evidence was disallowed, especially for that the Duke of *Somerset* was attainted, and so his Privileges thereby extinct, unless regranted, *3 Keble 456. in Sanford and Clerk's Case, Moor 297.*

Rastal's Statutes are good Evidence of ^{Statutes.} general Statutes, but not of private Acts.

Deed with Seals torn off admitted to declare Use of a Recovery, *Palmer's Rep. 403.* ^{Deed.} ^{Seals.} See *Modern Rep. tit. Evidence.*

The Chirograph of a Fine may be given in ^{Fine.} Evidence, but not given to the Jury; but a ^{Recovery.} Recovery may be delivered in Evidence, *2 Siderfin 145, 146. Plow. Com. in Scholastica's Case, 410.*

Recovery in Value in Evidence may be given in Evidence, *2 Sid. 145.*

Recital of a Patent in another Patent is no ^{Recital.} Evidence of the Recited Patent, *2 Roll. 678. Trial per Pais 232, 235. Hardres 323.*

Recital

Pedigree.

Upon Evidence to a Jury to prove *J. S.* to be Heir to *W. S.* the Court would not accept the Pedigree drawn by an Herald at Arms for Evidence, nor would suffer the Jury to have it with them, but 'tis only Information for Direction, *Pasch. 8. Jac. B. R. Sir Edward Plumptre and Robinson, 2 Roll. 687.*

Ejectment.

A Verdict for a Lessee, is good Evidence for the Reversioner in an Ejectment, *Hardres Rep. 472.*

Secus in Case of Depositions for the Lessee, the Reversioner without being Party to the Suit, can have no Advantage, 472, 473, *Ibid.*

Non debet.
General Pardon.
dons.

The Act of general Pardon cannot be given in Evidence on *non debet modo & forma*, but ought to be pleaded, for that it is not the general Issue within the Intent of the Act, *Hardres Rep. 421.*

Payment at
the Day.

If a Condition be to pay Money at a certain Day and Place to avoid a Feoffment, Acceptance before the Day, although he make an Acquittance, doth not maintain the Issue joined on Payment at the Day and Place, *Moor 47.*

A Record
lost proved
by Testimony.

A Recovery in the Court of ancient Demesne, to cut off an Entail which had been suffer'd a long Time since, and the Possession gone accordingly, was lost, and the Court admitted other Proof of it to be sufficient: And said, if a Record be lost, it may be proved to a Jury by Testimony, *Anonymus, B. R. 1 Ventr. 257.*

Deed shall
not be allowed
in Evidence until
it be stamped.

By 5 & 6 *W. & M. cap. 21.* No Deed shall be given in Evidence in any Court either of Law or Equity, until it be stamped as the Law requires.

Resolved by the Judges, That in Case Witnesses who were examin'd before the Coroner, are dead or unable to travel, and Oath made thereof, That such Examinations are the same which he took upon Oath without any Addition or Alteration: And that in Case Oath should be made, That a Witness who had been examin'd by the Coroner, was detain'd by the Procurement of the Prisoner, his Examination may be read; but agreed also, That if a Witness who was examined by the Coroner, be absent, and Oath made that they have used all their Endeavours to find him, and cannot find him, That is not sufficient to authorize the reading such Examination, *Kelynge 55.*

Where Examinations before the Coroner, shall be read in Evidence, and where not.

An Action on the Case was brought on a Bill of Exchange against the Indorfor, and it was ruled by *Holt Ch. J.* upon Evidence, That there is no need to prove the Drawer's Hand, because though it be a forged Bill, the Indorfor is bound to pay it. 2. The Plaintiff must prove, That he demanded it of the Drawer, or him upon whom it was drawn, and that he refused to pay it, or else that he sought him and could not find him; for otherwise he cannot resort to the Indorfor. 3. That this was done in convenient Time; for if they stand and are responsible a convenient Time after the Assignment and no Demand made, the Indorsee shall not charge the Indorfor. The Time for foreign Bills is three Days, and no Allowance is to be made for Sundays and Holy-days. Serjeant *Wright* cited a Case of one *Tracy*, who stood a Week after the Indorsement, and the Indorsee lost this Money, which *Holt Ch. J.* thought too strait, but such Matters must be left to the Jury. 4. 'Tis a Question, whether Notice may be given

What Things are necessary to be proved to charge the Indorfor of a Bill of Exchange in an Action by the Indorsee.

given or no ; but 'tis fair to give Notice. 5. That the Demand must be prov'd subsequent to the Indorsement, for if it was precedent, he would only act as Servant to the Indorfor, and so the Demand was insufficient to charge the Indorfor. 6. If a Man indorses his Name upon the back of the Bill blank, he puts it in the Power of the Indorsee, to make what Use of it he will, and he may use it as an Acquittance to discharge the Bill, or as an Assignment to charge the Indorfor. 7. In Cases of Bills purchased at a Discount, this is the Difference ; if it be a Bill payable to A. or Bearer, 'tis an absolute Purchase ; but if to A. or Order, and it is indorsed blank, and filled up with an Assignment, the Indorfor must warrant it as much as if there had been no Discount, *Lambert versus Park, Salk. 128.*

Holt Ch. J. held, That the drawing of a Bill is an actual Promise, *ibid.*

Record of
Sessions al-
lowed in E-
vidence.

Indebitatus Assumpsit for 5 l. received to the Plaintiff's Use, being Fees of the Office of Clerk of the Peace in *Oxfordshire* ; upon *Non assumpsit* it was insisted on, That the Plaintiff had forfeited his Office by not qualifying himself according to Law. And a Record of Sessions was allowed in Evidence to prove the Plaintiff had not taken the Oaths. It was there held by *Holt Ch. J.* That if a Judge admits that for Evidence which is not, the other Side cannot demur for that Cause, but must tender a Bill of Exceptions ; and he said, he remembred a Case where the University of *Oxford*, intituled themselves to a Presentation by a Conviction of the Earl of *Sbrewsbury* for Recusancy ; and upon giving some Evidence that the Record was lost, the University was per-

The Matter
of a Record
lost may be
proved.

permitted to prove the Effect of it by other Evidence, *Thurston versus Slatford*, *Salk.* 284.

The Plaintiff being a Brewer, brought an Action against the Earl of *Torrington* for Beer fold and delivered, and the Evidence given to charge the Defendant was, That the usual way of the Plaintiff's Dealing was, that the Draymen came every Night to the Clerk of the Brewhouse, and gave him an Account of the Beer they had delivered out, which he set down in a Book kept for that Purpose, to which the Draymen set their Hands, and that the Drayman was dead, but that this was his Hand set to the Book: And this was held good Evidence of a Delivery: Otherwise of the Shop-Book it self singly, without more, *Price versus the Earl of Torrington*, *Salkeld* 285.

Per Holt Ch. J. In a Case in my Lord *Hale's* Counterpart, Time, between *Combe* and *Mayo*, a Counterpart of an ancient Deed, was admitted as Evidence of the Deed, and the special Verdict was drawn up, as finding the Deed with a *prout patet* by the Counterpart, which he said was done to preserve the Precedents: And now by all the Court, the Counterpart of a Deed without other Circumstances, is not sufficient Evidence, unless in Case of a Fine, in which Case a Counterpart is good Evidence of it self, *Anonymus*, *Salkeld* 287.

A Corporation-Book was offered in Evidence at the Assizes, to prove a Member of the Corporation not in Possession, and refused. No Bill of Exception was then tendered, nor were the Exceptions reduced to Writing, so the Trial proceeded, and a Verdict was given for the Plaintiff. Next Term the Court was moved for a Bill of Exceptions,

A Shop-Book with corroborating Evidence, allowed in Evidence after a Year.

where Evidence.

Bill of Exceptions must be tendered at the Trial.

and it was stirred and debated in Court. It was urged, that the Law requires *quod proponat exceptionem suam*, and no Time is appointed for the reducing of it into Writing; and the Party is not grieved till a Verdict be given against him; and the same Memory that serves the Judges for a new Trial, will serve for a Bill of Exceptions. On the other Side, it was said, That this Practice would prove a great Difficulty to Judges, and Delay of Justice; that the Precedents and Entries suppose the Exception to be written down upon its being disallowed, and the Statute ought to be construed so as to prevent Inconvenience: Besides, the Words of the Act are in the Present Tense, and so is the Writ formed on the Act. *Holt* Ch. J. If this Practice should prevail, the Judge would be in a strange Condition: He forgets the Exception, and refuses to sign the Bill, so an Action must be brought; you should have insisted on your Exception at the Trial; you waive it if you acquiesce, and shall not resort back to your Exception after a Verdict against you, when perhaps if you had stood upon your Exception the Party had other Evidence, and need not have put the Cause on this Point: The Statute indeed appoints no Time, but the Nature and Reason of the Thing requires the Exception should be reduced to Writing when taken and disallow'd, like a special Verdict or a Demurrer to Evidence; not that they need be drawn up in Form, but the Substance must be reduced to Writing while the Thing is transacting, because it is to become a Record; so the Motion was denied, *Wright* versus *Sharp*, *Salkeld* 288.

Upon

Upon a Trial at Bar in this Case, a Deed Indenture of Bargain and Sale acknowledged by the Bargainee and enrolled, by which a Term for Years was assigned, was given in Evidence without any Proof made of the Bargainer's Sealing and Delivery thereof. And after Debate it was allowed, *per Holt Ch. J. and Eyre Justice, & tot Cur.* for the Acknowledgment of the Party in a Court of Record, or before a Master extraordinary in the Country, (as this was) is good Evidence of its being sealed and delivered: And such an Acknowledgment estops a Man from pleading *non est factum*. Also Inrolments of Deeds on the Statute, are admitted every Day in Evidence, without Witnesses of the Sealing and Delivery; and it is the Acknowledgment which gives it Credit, and not its Operation or Contents. Also they held a sworn Copy of a Deed good Evidence, *Smartle versus Williams, Salkeld 280.*

In an Information for a Libel against the Government, Not guilty being pleaded, upon Trial the Attorney General offered in Evidence, Depositions taken before a Justice of Peace, relating to the Fact, the Deponent being since dead. *Et per Cur.* upon Advice with the Justices of the Common Pleas. In Cases of Felony, such Depositions before a Justice, if the Deponent die, may be used in Evidence by the Statute of 1 & 2 Ph. & Mar. cap. 13. But this cannot be extended farther than the particular Case of Felony, and therefore, not to this Case, *Rex versus Paine, Salkeld 281.*

Indenture of Bargain and Sale inroll'd, may be given in Evidence without proving the Execution.

Depositions before a Justice, Evidence only in Felony.

A History
may be Evi-
dence to
prove a Mat-
ter relating
to the King-
dom in gene-
ral, but not a
particular
Right.

Heralds
Books and
Parish Regi-
sters allowed
to be Evi-
dence.

An Issue was directed out of Chancery, wherein the Question was, Whether by the Custom of *Droitwich*, Salt-pits could be sunk in any Part of the Town, or in a certain Place only? And upon a Trial at Bar, *Cambden's Britannia* was offered in Evidence, but refused: For the Court held, That a general History might be given in Evidence to prove a Matter relating to the Kingdom in general, because the Nature of the Thing requires it, but not to prove a particular Right or Custom; so in the Case of *St. Katherine's Hospital*. *Hole Ch. J.* allowed a Chronicle to be Evidence of a particular Point of History in *Edward* the third's Time: So a Year-Book may be Evidence to prove the Course of the Court; yet in this Case it was admitted, That *Heralds Books* are good Evidence as to Pedigrees, and *Parish-Registers* as to Births and Marriages, upon the Nature of the Thing; and it was said, That in the Exchequer the Question being, Whether the Abbey *De sentibus* was an inferior Abbey or not? *Dugdale's Monasticon Anglicanum* was refused for Evidence, because the original Records might be had in the Augmentation Office, *Stainer* versus the Burgeses of *Droitwich*, *Salkeld* 281.

Of Evidence in Courts of Equity, and the Ecclesiastical Courts.

Depositions.

Depositions in the Ecclesiastical Court cannot be given in Evidence, though the Parties be dead, *March*, 120. A Defendant's Answer in an *English Court*, is good Evidence against him, but not against others, *Codbolt*, 326.

I can-

I cannot make use of Depositions in a Cause wherein I was not a Party, for as they cannot be read against me, no more can they be read for me, because I am not bound by them, nor in a Capacity of examining Witnesses in it, or preferring Interrogatories. And 'tis not like the Case of an Ejectment brought by a Reversioner, or Debt upon the Statute of *Ed. 6.* brought by a Proprietor of Tithes, after a Verdict at Law, for the Lessee or the present Proprietor, the Reversioner of the Lands or Tithes, shall have advantage of the Verdict, and give it in Evidence; and the Reasons are, because they cannot be immediate Parties to the Action or Suit, for that must be prosecuted by the Lessee or present Tenant, and they may give in Evidence as well as the Plaintiff himself; but it is otherwise in Case of Depositions, for there only Parties to the Suit can examine or interrogate; likewise the Reversioner or Seigniores, (whose Tenants were only Parties in the former Suit) might themselves have been Parties in a Suit in Equity. The Countess of *Pembroke's Case*, *Hardres Rep* 472.

The Depositions of a Witness taken before Answer, to preserve his Testimony who dieth after Answer, shall not be given in Evidence, although he continued so sick, that he could not be examined after Answer, *Hardres Rep.*

315.

Depositions in Chancery of Witnesses that are dead may be read at the Assizes betwixt the same Parties, proving the Bill and Answer.

See *Keble* 2 Part, 31. An old Exemplification or Depositions in Chancery given in Evidence, although the Bill and Answer were

not in it, for above forty Years since 'twas not usual to insert Bill and Answer.

The Answer of one Defendant is not Evidence against another Defendant.

If Witnesses are examined *de bene esse*, before Answer upon a Contempt, such Depositions cannot be made Use of in any other Court, but in the Court only where they were; the Reason seems to be, because there was no Issue joined, so as there could be a legal Examination, and they were only taken to be read in the Court in which they were taken, upon a Contempt to that particular Court, *Hardres Rep.* 332.

An Answer in *Chancery*, is Evidence against the Defendant himself; but the Bill must be proved, *Godb.* 326.

If the Party make Oath that he cannot find his Witness, then he is as it were dead, and his Depositions in an *English* Court, may be given in Evidence betwixt the same Parties, *Godb.* 327. Not only the Plaintiff, but any Stranger may give the Defendant's Answer in Evidence against the Defendant, but not against others, *Siderfin* 221. A Bill in *Chancery* given in Evidence against the Plaintiff himself, where there are Proceedings upon it, *Kemble 2 Part*, 499.

Depositions.

Depositions in the Court Christian, in the Court of the Council of *York*, touching the Title of Land, of which they have not Conusance, or in another Suit against him, who claimeth not under those Parties, by the Commissioners upon a Commission of Bankrupt, because the Party could cross-examine, shall not be allowed in Evidence. But see *Kemble 2 Part*, 348.

But

But a Sentence given in the Spiritual Court touching Tithes, may be given in Evidence in an Action at Common Law, for this is a judicial Act.

A Thing which is concluded in the Ecclesiastical Court concerning Lands, is not to be given in Evidence to Juries, for the Courts of Common Law are not to be guided by their Proceedings, *Mich. 22 Car. B. R.*

Regularly the Depositions in Chancery of a Witness, shall not be given in Evidence if he be alive, although he be beyond sea, as in *Ireland, &c.* Otherwise if he be in *France*, or another Kingdom not subject to the Dominion of our King.

Note. That the Depositions taken before the Commissioners of Bankrupts shall not be used as Evidence at a Trial, although the Witnesses be dead: But Depositions taken before the Coroner, with Proof that the Party that made them is dead, shall be good Evidence, as it was ruled in the Case of the King and *Browning, Pasch. 18 Car. 2. B. R.*

A Decree produced in Paper, is not to be given in Evidence without Bill and Answer, *per Twisden.* Otherwise if not in Paper.

Decree in Chancery is not Evidence at Common Law, *2 Sid. 75.*

Bill in Equity is no Evidence against the Plaintiff.

The Father wrote a Letter signifying his Assent to the Marriage of his Daughter with *J. S.* and that he would give her 1500 *l.* but signified in another Letter, that he would not stand to those Proposals: He some Time afterwards declared, That he would agree to what was proposed in his first Letter. It was

A a 4

held,

Depositions
taken in *Canc.*
de bene esse,
are Evidence
at Law, where
the Witness
dies before
Answer.
Depositions
after Answer
read in Evi-
dence where
the Witness
cannot be
found.

Depositions
in *perpetuam*
rei memoriam,
are not to be
read in Evi-
dence while
the Party
lives.

held, That this verbal Declaration had re-
established the Promise in the first Letter,
and that it was a sufficient Promise in Writing
within the Meaning of the Statute of Frauds,
Bird versus Blofs in Canc. 2 Ventris 361.

In Ejectment at a Trial, Depositions taken
in *Chancery*, *de bene esse*, where the Witness
died before Answer put in, were held to be
good Evidence; and upon this Evidence a
Verdict *pro Quer.* It was held also, That
Depositions after Answer between the same
Parties might be read in Evidence, though
the Witness were not dead, if he could not
be found upon search, *Howard versus Tre-
maine, Mich. 4 W. & M. B. R. Shower 363. Sal-
keld 278.*

On a Trial at Bar in C. B. this Point arose,
viz. Depositions had been taken in *Chancery*,
in *perpetuam rei memoriam*. And it happened
afterwards that the Inheritance of the same
Land descended to the Person, who was
sworn as a Witness, and he was now a Party
to the Suit in Ejectment. And the Question
was, Whether these Depositions could be read
in the Cause? *Trevor Ch. J.* held, That they
ought; for that he was disabled to give Evi-
dence by the Act of God, so that it was in
Effect the same Thing as if he were dead.
Tracy and Blencow contra. Hereupon *Tracy*
came into B. R. to ask the Opinion of the
Court; and the Court agreed, they ought
not to be read: For *per Holt Ch. J.* The only
Intent of such Depositions was to perpetuate
Testimony in Case the Witnesses died, and
they cannot be read in any Case between o-
ther Parties till after the Death of the Wit-
ness, who is to appear and give his Evidence
viva

viva voce, so long as he lives; much less can they be read in this Case where the Witness himself is Party. To which *Trevor Ch. J.* agreed, *Tilley's Case*, *Salkeld* 286.

Of Evidence in Accompt.

Accompt pleaded before two; Accompt before one is good Evidence, *Hob.* 55. because the Accompt is the Substance.

In Debt for Arrearages of an Accompt upon *nil debet modo & forma*; no Accompt is good Evidence, 2 *H.* 6. 26.

Upon *ne unque son Receiver, &c* the Defendant cannot say that he paid the Money according to Directions, &c.

Against S. as Receiver of two 30 l. and as Bailiff for receiving his Rents for several Years, not saying any certain Sum of Rents: *Per Earl Serjeant*, The proper way is Action on to find *quod Computet*, as to what is certain in the Declaration and so proved, as the Money was, but not to the Rents, and so he said was the Opinion of *Hale*. But *per Moreton Justice*, the Verdict shall be general, and it may be both Ways, *Saye's Case*, *Norf. Lent Assizes* 1667.

Of Evidence in Actions on the Case.

Quare defendens Crimen feloniam ei imposuit, &c.
The Plaintiff cannot give in Evidence Words only, but Acts, as arresting, charging or convicting him before Justice of Peace for Felony, *Saunders versus Edwards, Mich. 14 Car. 2. B. R.*

If any Action arises on Request, as in Trover or special Promise, the Statute of Limitation goes only to the Request., *Juy's Case, Mich. 1562, C. B. 1 Cro. 139.*

Declaration for Words spoken in the Presence of *A. B.* and others, in Evidence it sufficeth that they were spoken in the Presence of others only, *Winckfield and Coot, Lent Assizes Norfolk, 1662. per Hale Ch. Baron.*

In *Indebitatus* for carrying of Herrings; the Evidence was, he was a Porter at *Tarmouth*, and when Herring-Ships came Home, he went (of his own Head) and carried up to the Defendant's House, with other Porters, so many Herrings; and good by *Twisden*, Judge of Assize, *Norf. Summer 1662. Fermin versus Lucas.*

Pew.
Kable 2 Part,
342.

In Action for hindring to sit in a Pew, claimed by Prescription, repaired, &c. ought to be given in Evidence; and one may prescribe to sit in the uppermost Seat in a Pew, *Buckston and Bateman, Mich, 14 Car. 2. B. R.*

In Action for executing an illegal Warrant, &c. It is good Evidence to prove the Justice of Peace acted as such, without shewing his Commission; so on the Statute of Hue and Cry, *Constable's Case. Norf. Lent Assizes, per Hale Chief Baron.*

Action

Action for stopping up Lights, &c. One had a Piece of Ground and builds an House on Part, and leases it, then he sells the other Part of the Ground to one who builds on it, and stops up the Lights of the first House, the Lessee has a good Action. But if two own two Pieces of Ground, and one builds, the other may also build and stop up his Lights, *Palmer versus Flesher, Mich. 15 Car. 2. B. R.*

If a Master always gives his Servant Money Master. to buy his Markets with, it is good Evidence to discharge the Master in an Action brought against him for Goods taken up on Trust, by that Servant. *Per Glyn Chief Justice, Mich. 1658. at Guildball, Sir Tho. Rouse's Case.*

The Master declared, That the Defendant Master. dug a Pit, and as he was driving his Horse, he fell in the Pit, &c. To prove the Servant drove the Horse doth not maintain the Declaration, *Style 335.*

A Watercourse runs through my Grounds to the Grounds of J. S. where is a Pit that Time out of Mind used to be filled with that Water, I may stop the Water in my Ground, and use it as I will, so I do not turn the Course another Way, but when I have done with it, let it fall into its own Course. *Per St. John Chief Justice, C. B. Suff. Summer Assizes 1657. Smart and Tystead.*

Action for Words, *You forswore your self in your Answer in Chancery.* Defendant justifies. Plaintiff replies, *de injuria sua propria absque tali causa.* *Per Hale, Summer Assize, Suffolk,* It is a good Replication, and a small Mistake in an Answer shall not convict of Perjury, for the Counsel may mistake or his Clerk.

Action

Action for not scouring a Ditch, by which the Water overflowed his Land, &c. and declare *quod quidam Rivus* ran there, &c. Upon Evidence it appeared only a Land-flood, and good by Name of *Rivus*, though it be dry great Part of the Year; and it was held the best pleading of the Course of this River to put a Place from whence it comes, and so to the Plaintiff's Land, without mentioning mean Places by which it passes, which may by many, and must be proved if laid, *per Whitfield* 1641. *York. Clayton* 96.

Soldiers lying in an Inn fourteen Days, are Guests within the Custom of England, *Harland's Case*, *per Whitfield* 1647.

The Plaintiff in Action of the Case intitles himself by Prescription, to a Fold-course for Sheep upon all the Lands in such a Field on *Michaelmas-day*, and so to *Lady-day*, the Lands being unsown, and for that the Defendant put on Sheep, &c. before *Michaelmas-day* and after, and thereby fed the Grounds, &c. the Plaintiff could not take so good Feed, *actio inde*.

1. The Owner may put on Sheep, and feed his own Grounds before *Michaelmas*, unless a Custom be to the contrary, which ought to be laid in the Declaration. *Contra* of a Stranger.

2. It appearing that Part of the Lands, &c. had been the Lands of the Plaintiff, who was Lord of the Manor, and prescribed as such, and there being no Exception of those Lands in the Prescription, the Plaintiff was nonsuit; for as to those Lands the Prescription is gone by Unity of Possession. *Per Hale* Chief Baron, *Norfolk, Summer Assizes*, 1661. *Branthwait versus Hunt*.

In Action upon the Case for retaining of his Servant *per quod servitium amisit*, the Plaintiff ought to prove that the Defendant had Conusance, that he was his Servant. *Eod Termin. Servant.*

In an Action on the Case, when the Request is laid at one Time in the Declaration, a Request at another Time may be given in Evidence, *Sid. Rep.* 268. Request another Day.

In an Action on the Case for the Profits of Master of the King's Wardrobe, it was insisted for the Defendant, That the Plaintiff's Patent having recited a former Grant, he must prove that Grant to have been surrendered: To which it was answered, That if they took Advantage of the Recital, they must admit all that was recited, as well the Surrender as the Grant. And of that Opinion was the Court. And it was said, That in an Action of this Nature, it is not necessary to shew every particular Sum received by the Defendant; but it is a good Evidence for the Damage to shew the Profit of the Office *Communibus annis*, Earl of Mountague versus Lord Preston, *2 Ventr.* 170. Where Advantage is taken of a Recital, all must be admitted that is recited. And in an Action of the Case for the Profits of an Office sufficient to shew the Profits *Communibus annis.*

In an Action on the Case for Money had and received to the Plaintiff's Use, it appeared upon Evidence, That *Layfield* and the other Defendants were Bankers and Partners, and that the Plaintiff had given *Layfield* 20 s. for which he received a Ticket in the double Exchange-Lottery, and *Layfield* undertook to pay what Benefit should happen thereupon. That the Ticket came up a 40 l. Benefit, and for that Money the Action was brought. And it was objected for the Defendant, That the Action was brought against *Layfield* and his Partners; and it did not appear that any had undertaken to be Trustees in the Lottery Where a Plaintiff goes upon the Credit of both Partners, the Act of one is Evidence against the other, unless he shews a Disclaim.

but *Layfield*, and therefore he only ought to be charged, and not his Partners. To which *Holt Ch. J.* answered, That it appeared they were Partners in their Trade, and Goldsmiths, and the Adventurers put their Money in upon the Credit of the several Goldsmiths that had undertaken to pay the Benefits ; and it should be presumed the Act of *Layfield* was the Act of the other, and should bind him unless he could show a Disclaimer, and a Refusal to be concerned in it ; and accordingly the Plaintiff had a Verdict for forty Pounds. — versus *Layfield & alⁱ. Salkeld*, 291.

Master of a Stage-Coach not chargeable for Goods lost by the Driver, unless the Master takes a Price for the Carriage of Goods.

An Action on the Case upon the Custom of the Realm, was brought against the Defendant being Master of a Stage-Coach, and the Plaintiff set forth that he took Place in the Coach for such a Town, and that in the Journey the Defendants by their Negligence lost a Trunk of the Plaintiff's : Upon Not guilty pleaded, upon the Evidence it appeared, That this Trunk was delivered to the Person that drove the Coach, and he promised to take Care of it, and that the Trunk was lost out of the Coachman's Possession ; and if the Master was chargeable with this Action, was the Question. *Holt Ch. J.* was of Opinion, That this Action did not lie against the Master, and that a Stage-Coachman was not within the Custom as a Carrier is, unless such as take a distinct Price for carrying Goods as well as Persons, as Waggons with Coaches ; and tho' Money be given to the Driver, yet that is a Gratuity and cannot bring the Master within the Custom : For the Master is not chargeable with the Acts of his Servant, but when he acts in Execution of the Authority given by his Master ; and then the Act of the
Servant

Servant is the Act of the Master ; and the Plaintiff was nonsuited, *Middleton versus Fowler*, *Salkeld* 282.

Of Evidence in Assumpsit.

Upon an *Assumpsit* to the Husband, an *Assumpsit* to the Wife and his Agreement is good Evidence, 27 H. 8. 29. Upon *Non Assumpsit* to a special Promise, Payment is no Evidence by three Judges.

Upon *Non Assumpsit*, in a general *Indebitatus Assumpsit*, the Defendant may give in Evidence, Payment at any Time, before the Action brought, but upon a special Promise to pay Money, &c. it is otherwise, *Causa patet* ; for in the first Case, if there be no Debt the Law will infer no Promise.

In *Indebitatus*, Covenant to pay is no Evidence, 2 Cro. 505. Nor Money due for Rent by Specialty, or on Record, *Hob.* 284. *Hutt.* 35.

But an Account stated for Rent and other Things, is good Evidence.

Indebitatus Assumpsit against Baron for Necessaries for his Wife, they must be according to his Estate, as well as Degree, *Siderfin* 128. If she doth not cohabit with him the Action doth not lie. If the Goods bought by the Wife or Servant come to the Use of the Husband, although this be no binding Evidence, yet this presumptive Evidence shall charge him.

He may forbid one or two, &c. to let her have Goods, but a general forbidding also is void, *Keble*, 2 Part, 554.

Per Hale Chief Justice, *deins* Age may be given in Evidence on *Non Assumpsit*, in an *Indebitatus* Infancy.

debitatus Assumpsit, Keble's, 2 Part, 851. *Painter and Bowman's Case*.

In *Indebitat.* not for Money, &c. Delivery of Corn or other Matter in Satisfaction, is good Evidence. *Contra* in a special Action of the Case on *Assumpsit*. *Vide Keble*, 3 Part, 18.

Indebitatus lies for Money won at Dice, *Wiche's Case*, Hill. 14, 15 Car. 2. B. R.

If a Promise be made to pay at a Day certain, and the Day is past, the Plaintiff may declare to pay on Request: So if he declare on Payment at a Day certain, and give in Evidence a Promise on Request, *i. e.* when it is created on Account which gives the Duty, for there the Time is *ex abundanti*; but where the Action is founded on the Contract, otherwise, for there the Evidence must pursue the Contract, Hill. 1650. B. R. *Child's Case*.

Promise to restore a Horse hired for a Journey, if the Horse dies in the Journey without the Rider's Default, his Promise binds not, *Lisle's Case*, cited in *Matraver's Case*, Trin. 1651. B. R.

One brings an *Assumpsit* for 20 l. and gives in Evidence a Promise if two would surrender to pay them 20 l. apiece, good, Mich. 1655. B. R. *Thomas and Gery*.

Indebit. for 50 l. brought by *Edgar* against *Chetham* Clerk. The Evidence was *T.* was indebted to *Edgar* in 50 l. *Chetham* desires *Edgar* to let him take the 50 l. of *T.* and he would give *Edgar* a Bill of Exchange to receive so much at *London*: Accordingly *T.* promises to pay *Chetham* the Money, which Promise he accepted, and gave a Bill of Exchange to *Edgar*; after *T.* became insolvent, then *Chetham* prohibits the Payment of his Bill, whereupon this Action is brought. *Per Wadb.*

Wadh. Wyndham Justice Assize, Norfolk, Summer, 1663. The Action lies, for *Chetham* having accepted the Promise of *T.* and given a Bill, &c. is now become a Debtor to *Edgar*, until his Bill be paid, though he never receives the Money of *Thompson*.

In *Indebit.* it is good Evidence against the Father, that Physick was delivered to his Daughter at his Request, *Stonehouse* versus *Bodvil*, *Hill. 14 Car. 2. B. R.*

One promises a Bailiff, That if he would let one arrested be in his House that Night, he would deliver him in the Morning; it's a good Promise, and the Bailiff or the Plaintiff may bring the Action, *Benson* vers. *French*, *Pasch. 15 Car. 2. B. R.*

Indebitat. The Case was, the Plaintiff sold sixty Comb of Rye to the Defendant at fourteen Shilling per Comb, to be delivered before *Michaelmas*; the Plaintiff delivered fifty Comb before the Time, and brought this Action for the Money for it, and good, though it was agreed, the Money to be paid on the Delivery of the last Rye. *Per Hale* Chief Baron.

1. Though the Agreement is intire, yet the several Deliveries make several Contracts.

2. Though the Payment was to be on the last Delivery, yet a Time being set for Delivery, it's intended to be paid when the Delivery should have been.

3. The Time being past, it's now a Duty, and so *Indebitatus* lies.

4. The Defendant hath his Remedy for delivering the Residue. *Barker* versus *Sutton*, *Lent Assize Norf. 1662.*

Of Evidence in Assumpsit. Ch. 15.

The Court would not admit Evidence of Account current to maintain *Indebitatus*, because 'twould involve the Court in a tedious Examination; but if the Account had been stated, then *Indebit.* upon the Account is usual, *Keble. 2 Part, 781.*

Indebitatus Assumpsit pro opere, or pro diversis mercimoniis, or pro servitio, or labore, is good, and the Particulars may be given in Evidence: Otherwise of an Indebitatus generally, or pro multis beneficiis, &c. Keble. 3 Part, 781. Keble 2 Part, 552.

Indebitatus lies for a Portion after the Jointure settled; so for a thousand Pounds, on promise for so much for every Horseshoe-Nail, but the Jury may mitigate Damages, *ib.*

A Promise to marry *B* within three Months, within a Fortnight after they meet, and the Party promises again to marry her within three Weeks, this last Promise is no Discharge of the former, being all within the Time of three Months; but had the last Promise been to marry her within some other Time after the three Months, it had discharged the former, *Hite versus Chaplin, Pasch. 1658. B. R.*

Indebitatus by one, Defendant gives Evidence that another was Partner with the Plaintiff at the Delivery of the Wares; Plaintiff nonsuit, *Franklin versus Walker, Norf. Lent Assize 1667. Per Moreton contr. in Trespass, for there Jointenancy must be pleaded.*

In *Assumpsit* in Fact, and *non Assumpsit* pleaded, a Release cannot be given in Evidence, unless only to mitigate Damages; but it may upon an *Assumpsit* in Law, to maintain *non Assumpsit*.

Indebitatus

Indebitatus for 9 l. Defendant pleaded *non Assumpsit infra sex annos*, Issue *inde*, the Plaintiff proved a Debt of 9 l. due ten Years before, and an Acknowledgment of the Debt within six Years, and an Offer to pay 5 l. for the whole.

Per Hale, The Plaintiff Nonsuit; for the Acknowledgment of the Debt is no more than is done by the Plea, but there must be a new Promise of the Debt within six Years, to make the Action hold, and here the Promise or offer to pay 5 l. gives no Action for the 20 l. *Bass versus Smith, Suffolk, Summer Assize, 1668.*

If a special Promise to pay 20 l. if the Plaintiff would pay 10 l. &c. Upon an Averment that he paid the 10 l. upon *non Assumpsit*, the Defendant shall not give in Evidence that the Plaintiff did not pay the 10 l. neither is the Plaintiff bound to prove it, for the Issue is upon the *Assumpsit*, and not upon the Payment of the 10 l. which might have been traversed. And although it was said, That in all Actions there is a general Issue to be taken, which shall put all the Declaration in Issue, and that must in this be *non Assumpsit*, or nothing, yet by the Advice of all the Justices of *Serjeants-Inn in Fleetstreet*, it was ruled as abovesaid, *Mich. 16 Car. B. R. between Holdich and Brodrig.* I have been the more particular in this, because I have known Plaintiffs nonsuited in such Cases at the Assize for want of proving the Averment: Although I must confess I never agreed with the Judge herein that did it. For it is a Mistake to say, the Plaintiff must in all Cases prove his whole Declaration; if he proves the Matter in Issue, he ought not to be nonsuited, *Roll. tit. Trial. 1681.*

Indeb. Assump.
Account.

Matters that lie in Account, are not to be given in Evidence on an *Indebitatus Assumpsit*, per North Chief Justice, *Modern Rep.* 270.

Payment.

In an Action of *Assumpsit*, grounded upon a Promise in Law, Payment may be given in Evidence, but not where the Action is grounded upon an express Promise.

Promise.

Upon an *Assumpsit*, the Plaintiff declares upon two Considerations, and a simple Promise: If the Jury find but one, or a conditional Promise, this doth not maintain the Issue for the Plaintiff, *Leon* 173. *Musted* and *Hopper's Case*.

In *Indebitatus Assumpsit*, Infancy may be given in Evidence on *non Assumpsit*.

In *Assumpsit* for Money, and likewise for Money laid out to the Use of the Defendant's Wife *dum sola*; on *non Assumpsit* pleaded, at the Trial the Defendant offered to give in Evidence, the Infancy of the Feme at the Time of the Promise, which the Chief Justice doubting of, it was referred by Consent, to him as a Case, who consulted with the rest of the Judges; and they all agreed, That upon the general Issue, such Evidence hath been of late admitted, *Darby versus Boucher, Salkeld* 279.

Parol Promise to be performed on a Contingency, is not within the Statute of Frauds, which makes a Promise void, that is not to be performed within a Year.

A parol Promise was made to pay a Sum of Money upon the Return of such a Ship, which Ship happened not to return within two Years Time after the Promise made: It was resolved by all the Judges, That this was a good Promise, and not within that Clause of the Statute of Frauds, which says, *That no Action shall be brought upon an Agreement, that is not to be performed within one Year, unless it be in Writing*, for that there was a Possibility of the Ships returning within the Year: And that Clause extends only to such Promises, where by express Agreement the Thing is not to be per-

performed within a Year, *Anonymus, Salkeld*, 280.

In *Assumpsit* upon a Note for 10 l. 15 s. given by the Defendant to the Plaintiff, and *Non Assumpsit* pleaded; upon Trial the Plaintiff produced and proved the Note. The Defendant in Discharge of himself, produced the Record of a Foreign Attachment, wherein the said Debt was discharged by the City Process, for the Satisfaction of a Debt demanded there of the Plaintiff, and was there condemned: And it was ruled by *Trevor Ch. J.* That this was a good Discharge, but that if the Plaintiff in this Action, could have shewed the Original, wherein he declared to be precedent to that Attachment, so that it had appeared, that this Court was possessed of an Action for the Demand of this Debt before it was attached, then should the Plaintiff have recovered his Debt notwithstanding such Evidence; but the Declaration in the Record here was betwixt the Time of the Attachment and of the Condemnation, *Savage's Case, Salkeld* 291.

In *Assumpsit* Evidence was given, That the Debt was attached by the Custom of *London* before the Action brought, and Condemnation had before the Plea pleaded. And it was urged, That this should relate to defeat the Action. But *per Cur.* it was ruled, That if an Attachment and Condemnation be before the Writ purchased, it may be given in Evidence on the general Issue, because that is an Alteration of the Property before the Action brought; but if the Attachment only be before the Writ purchased, it ought to be pleaded in Abatement of the Writ; and if the Condemnation be after the Action commen-

Record of a foreign Attachment produced to discharge the Defendant in *Assumpsit* upon a Note.

Where upon *Non Assumpsit* Condemnation in foreign Attachment may be given in Evidence, and where it must be pleaded.

ced, and the Plea pleaded, then it may be pleaded in Bar, but shall not be given in Evidence on *Non Assumpsit*, for that the Property is not altered until Condemnation, and the Plaintiff had a Verdict, *Brook versus Smith, Salkeld* 280.

Winner shall not recover on a Bill for Money won at Play against an Acceptor, otherwise of an Indorsee.

Where Matter amounting to the general Issue, may be pleaded specially.

Where the Contract is entire, what Proof is requisite.

The Lord *Chandois* lost Money at Play to *Hussey*, and gave him a Bill for it on *Jacob*, who accepted it, and afterwards refused to pay; and now an *Assumpsit* was brought against *Jacob*, and he pleaded 16 *Car. 2. cap. 7.* to which it was demurred: And first, It was objected, That this amounted to the general Issue: *Sed Curia contra*: For where the Matter of the Plea confesses the Cause of Action, but avoids it, the Defendant may plead specially, though he might have given it in Evidence: Otherwise where the Matter of the Plea does not avoid but deny, 3 *Cro.* 871. Second Objection, this is out of the Statute, because the Nature of the Duty is altered, and a new Contract created by the Acceptance, which is the ground of this Action. *Sed non allocatur*: For though this is a kind of new Contract, yet all is founded on the illegal and tortious Winning, and only secures the Payment of that Money, and therefore it is within the Statute, the Plaintiff being privy to the first Wrong: But if *Hussey* the Plaintiff had assigned this to a Stranger, *bona fide*, upon good Consideration, he had not been within the Statute; for he was not privy to the Fact, but an honest Creditor, *Hussey versus Jacob, Salkeld* 344.

Quarto Jacobi secundi, An *Assumpsit* was brought against four, who pleaded *Non Assumpser. infra sex Annos*, and the Verdict was, that one of them did assume *infra sex Annos*, and the other

non Assumpser. And it was moved that no Judgment could be given against the Defendant, upon whom the Verdict was found; for this is an *Indebitatus Assumpsit* for Goods sold; and 'tis an entire Contract, and they must all be found to promise, or else 'tis against the Plaintiff, 2 *Ventr.* 151.

Torts are in their Nature several; so one Defendant may be found guilty, and the other found not guilty, but 'tis not so in Actions grounded upon Contract, 2 *Ventris* 151. Torts may be found severally.

Of Evidence in Debt.

Upon *non est Factum*, 'tis no Evidence to shew the Bond that was made upon an usurious Contract, or that the Sheriff's Name is mistaken, &c. in a Bail-Bond; or that the Bond is joint or several, or delivered at another Place; or that it is void by Statute, but it must be pleaded in Abatement, 1 *Inst.* 283. *Hob.* 72. *Non est factum.*

But to prove that the Seal was broken off, and put on again; or to prove a Rasure of the Deed, delivered as an Escrow, &c. this is good Evidence, *Li.* 5. 119. 11. 27. if 'twere done before the Action brought; but if the Seal was broke off, &c. by chance, after Issue joined, the Jury may find it specially.

In Debt upon an Escape, if the Defendant plead *nul Escape*, he cannot give in Evidence no Arrest. Escape.

Debt on a Bond to perform Covenants, to deliver Possession at the Term's End to the Lessor, or his Assigns; Breach was assigned in not Delivery to two Purchasors, Demand being made by both, and Issue joined thereon; in Evidence, Demand by one is good, 2 *Cro.*

In Debt upon a Contract, that the Contract was conditional upon Account, that there was no such Account, *ne lessa pas* upon *nil debet*, in Debt for Rent.

In Debt upon the Statute of 21 H. 8. of Farms, upon the general Issue *non habuit*, he may give in Evidence the taking for the Provision of his House, according to the Proviso of that Statute, 27 H. 8. 21.

Debt on Bond to perform an Award, *ita quod* the Award be delivered to the Parties; in Evidence, Delivery proved to the Wife, is sufficient for the Jury to presume the Delivery to the Party himself, *per Hale*, Norfolk, Summer Assizes, 1665. Trice and Prat.

At the same Assizes, *per Moreton* Justice, Delivery to the Party's Son is good Evidence, Violet and Cook.

Debt against an Heir, &c. *riens per descent*, &c. a Feoffment given in Evidence made before the Action, that it was fraudulent may be given in Evidence, though not pleaded, 5 Rep. Co. Gooche's Case, 60. Hob. 72. Vide Fitz. tit. Garranty 88.

Debt against Executor, who pleaded *ne unques*, &c. Plaintiff replied, That he administered as Executor, and gave in Evidence Administration granted to him by which he administered, good, Dyer 305. But a Gift of the Goods the Defendant may give in Evidence.

In Debt against Executors, and *Plene administravit* pleaded, the Defendant cannot give in Evidence a Bond satisfied, where the Executor and Testator were Obligors, *per Coventry* Lord Keeper, 33 Eliz. Perkins vers. Perkins.

In Debt for Tithes, *Modus* to a Vicar is good against the Parson, and so is a *Modus* to

to a Parish-Clerk, *per Moreton Justice, Lent, Cambridge, 1667. Barber versus Cofier.*

In Debt against Executor *de son tort*, who pleads *Ne unques, &c.* It is sufficient to charge him, by proving he hath administred of never so little Value, *Clayton 6.*

Against Executor *de son tort*, who pleaded fully administred, the Evidence was, the Intestate made a Bill of Sale of his Goods to the Defendant; who was bound with him in a Bond as Surety, for his Counter-security, but the Goods remained in the Intestate's Possession during his Life, for some few Hours; ruled a fraudulent Deed by *Barkly Justice, at York, 11 Car. Legard and Binley, Clayton 39.*

Quære.

Debt against Administrator, who pleaded *If the De-Plene, &c.* and gave in Evidence Judgments, defendant and good without pleading, *per Henden, 1638. pleads plene, York, Clayton 65. Quære, for if Judgments be &c. prater Judgments, kept on Foot by Fraud, and given in Evidence, how can a Creditor who sues for a just Debt, be prepared to detect this Fraud? The Plaintiff must prove Assets above the Sum of those Judgments, And Note, In Scire facias against an Executor on Judgment per Testator, the Defendant pleaded fully administred generally, and the Plaintiff demurred specially, and Sir William Judge Wyndham, 33 Car. 2. Jones Solicitor-General moved to amend the Plea; and Hale Chief Justice thought he ought to plead specially, how fully administred, Bradford vers. Hutchinson, H. 25. 26 Car. 2. B. R.*

Debt for Rent on a Lease; the Evidence to prove the Lease was, That the Plaintiff leased a House to the Defendant at a Rent, but no Time mentioned, and it was agreed at the same Time, that the Lessee was not to leave it without half a Year's Warning, *per Hale,*

Hale, Norf. Summer Assize, 1668. It's a Lease at Will, and the leaving on half a Year's Warning. is but a collateral Agreement, and no Part of the Demise.

Debt for
Rent.

In Debt for Rent upon a Lease, and *Nil debet* pleaded, *ne unques seisie de terre* is good Evidence, otherwise upon the Plea of *riens arreare*, or *levy per Distress*.

Eviction or Expulsion may be given in Evidence upon *Nil debet* in an Action of Debt for Rent.

Debt for
Rent.]

In Debt for Rent upon *Non dimisit*, that the Lessor *riens avoit* in the Land at the Time of the Demise, may be given in Evidence.

So upon *Nil debet* an Eviction may be given in Evidence. If the Lessor enter into Part, the whole Rent is suspended; but if a Stranger evict the Lessee of Part of the Land, the Rent must be apportioned.

In Escape of a Prisoner, and the Issue is, if the Gaoler immediately after the Escape made fresh Suit, if the Prisoner hath escaped a Day and Night before the Gaoler knew it, and then he makes fresh Suit, it is sufficient to prove the Effect of the Issue, for convenient Pursuit is immediate fresh Suit in Law.

Fresh Suit.
Escape.
The Writ,
the Warrant,
Arrest and
Escape are to
be proved in
an Escape.

In Escape against the Marshal, the Plaintiff must prove the Person that escaped, in actual Custody since the *Committitur*, which *Committitur* either in the Marshal's Book, or on Record is not sufficient, without a Proof of being in actual Custody since, *Keb. 1 Vol. 375, 775. See Keble's 2 Part, 384.* What may be given in Evidence upon an Information of negligent Escape, against the Marshal of the King's Bench, as a Recovery in the Original Action, and the Plaintiff allowed a Witness, because he neither gains nor loses.

So upon *Riens per discent*, by an Heir in Debt upon an Obligation, that the Defendant aliened the Affets by Fraud and Covin, and so void by the Statute of 13 El. may be given in Evidence, because these are the general Issues.

In Debt against the Heir who pleads *Riens per discent*, Proof that the Father was seized, and that the Heir did enter after his Death, is well enough, for it shall be presumed Fee-simple till the contrary be shewn.

In Debt for Tithes, if the Plaintiff declares that he is Proprietor of a Farm, it's sufficient, and may give his Title in Evidence.

Entry and Suspension may be given in Evidence upon *Nil debet* pleaded, *Modern Rep.* 35. per *Twisden*, *Brown's Case*, 118.

Fresh Suit may be given in Evidence, in an Action of Debt for an Escape on *Nil debet* pleaded, per *Hale* and *Wild contra Twisden*. *Hale* said, he always allowed it, and so said *Wild Justice*, *Modern Rep.* 116. *Mosdale's Case*.

Upon a Trial at Bar it was agreed, That in Debt upon an Escape, and *Nil debet* pleaded, Reprisal upon fresh Suit may be given in Evidence by the Defendant in Excuse of the Action.

Upon this Issue the Defendant may give in Evidence, that he is a Lay-man not lettered, and that it was read to him in another Form, 15 E. 4. 18. but it is the best way to plead it, for the Understanding of the Jury, 39 H. 6. 9. *Bro. Waiver* 2.

In Debt for Rent upon a Lease for Years, the Issue being joined, if the Rent was paid or not, the Defendant gave in Evidence for Part of the Rent, that the Plaintiff was by Covenant to repair the House, and did it not,

not, and thereupon he expended the Rent in repairing the House, and the Question was, if this Evidence will maintain the Issue? *Gaudy* conceived it did, for the Law giveth this Liberty to this Lessee to expend the Rent in Reparations, and recoup the Rent, *V. 12 H. 8. 1. Fitz. tit. Bar. 242. 14 H. 4. 27. Fenner*, It is no Evidence, for if the Lessor will not repair it, the Lessee may have his Covenant against him. *Glench* seemed he might well expend the Rent in Reparations, but he ought to have pleaded it, and cannot give it in Evidence upon the general Issue, and thereupon they moved the Jury to find the special Matter.

So that it seemed to the Justices, That the Defendant had Liberty to expend the Rent in the Reparations (they being to be done at the Plaintiff's Cost) but then that he ought to have pleaded this Matter, as it was done in (almost) the like Case, *Fitz. tit. Bar. 242*. Yet why might he not give it in Evidence upon the general Issue? For if the Law allows this to amount to a Payment of the Rent, then the Defendant owes nothing, which maintains *Nil debet*, and I think the other Book of *14 H. 4. 27.* rejects this Sort of special Plea, upon this Reason, that the Plea amounted to a general Issue: but there indeed the Rent was pleaded to be laid out at the Plaintiff's Command, here only by Authority in Law. I should be glad if any one would reconcile these two Books better. I know there is another Reason in the Book (and assigned by *Rolle's* in his Abridgment of the Case) why the Plea was rejected, *viz.* That the Duty was acknowledged by the Plea, and therefore the Matter of the Plea not good, without shewing a Deed of it; but I should have been

been better pleased with him, if he had assigned the other Reason, *viz.* That it amounted to the general Issue. Which made *Cheyne* that he durst not join in Demurrer. For 'tis not pretended in either Case, that the Deed ordered the Rent to be laid out in the Repairs.

And in that Case in *F.* where there was no express Order of the Plaintiff; it may be the Judges allowed the special Matter to be pleaded, because the Jury should not be entrusted with the Law upon the general Issue, which may be said for the special pleading this Matter in our Case, although it may amount to the general Issue.

But as to the Residue, the Defendant shew-
ed, he paid it to others, by the Plaintiff's Or-
der, which was held clearly good, for what
is paid by the Lessor's Appointment, is a Pay-
ment to himself, *Cro. Eliz.* 223. *Taylor* against
Beal. *Vide Roll.* tit. *Debt* 605. 34 *H. 6.* 17. *Bro.*
Debt 27. *Reparations,*
Vide the Cases
of Recouper,
Lib. 5. 30.

In Debt for Servants Wages, *viz.* 20*s.* or a Debt for
Robe yearly: The Defendant may plead Pay-
ment of the Robe, and shall not be put to the
general Issue, where the Payment is of ano-
ther Thing than Money; but of Money he
must plead *Nil debet*, and give the Payment
in Evidence. And the Defendant may plead
that the Plaintiff departed out of his Service,
and shall not be forced to the general Issue,
9 *E. 4.* 36. Though surely that may be given
in Evidence upon *Nil debet*, for the Plaintiff
must prove he served: So *Indebitatus Assumpsit*
and *non Assumpsit*, upon the Promise in Law, an
Extinguishment by taking a Bond (being a
Matter of a higher Nature) for the Debt,
may be given in Evidence. *Extinguish-*
ment.

And Note, if an Infant buy Goods, and afterwards give a Bond, and this Bond be avoided by Infancy, yet it seems the Contract shall not be revived. *Sed dubitatur, Roll. tit. Extinguishment* 604. For now this Bond which was voidable, is become void, and a void Thing shall not have such Effect: But a Personal Action once suspended is gone for ever; but Acceptance of a Bond shall not extinguish Rent, nor Arrearages of an Account, before an Auditor of Record, because these are of a higher Nature than the Bond, the Rent being real, and the other of Record. But the Bond extinguishes the Contract for the Arrearages upon an *insimul computasset, &c.*

Acceptance.
Rent.

Acceptance of Rent due the last Day, and an Acquittance thereof, discharges all the Arrearages due before, *Lib. 3. 65.* Unity of Possession in as high an Estate destroys the Prescription, &c.

Payment.

In Debt upon a Bond, conditioned to pay 20 s. at the House of the Defendant, the 7th Day of May, upon Payment at the Time and Place. The Jury found the Payment before the seventh Day, and prayed the Advice of the Court, if this was a Payment at the Day. The Court adjudged that the Payment and Acceptance before the Day, was as well as if it had been paid at the Day, *Savil's Reports* 96. Bond against *Richardson*. And so says *Coke* 1 *Institutes* 212. The Time and Place are but Circumstances, and if the Obligee or Feoffee receive the Money at another Place, or before the Day, it is sufficient; or a lesser Sum before the Day. But *Moor* 47. Upon Issue of Payment at the Day and Place, and Evidence of Payment a Month before, and Demurrer upon the Evidence, *Dyer*, *Brown*

Brown and Welsh, said this Evidence doth not maintain the Issue, because before the Day of Payment there is no Duty, and the Day and Place are Parcel of the Issue, and the Act on one Day is not an Act done on another Day: As if an Executor pleads Payment at the Day, 'tis not good Evidence to shew that it was paid before the Day by the Testator, for this doth not prove the Issue, and yet there was not any Duty remaining at the Day, and therefore the Pleading ought to have been specially according to the Truth. *Vide devant* 198. And 'tis not like the Case, where the Circumstances of Time and Place are only for Necessity of Trial; but in Regard that Payment is the Substance, why is it not sufficient to prove, as well as to find, the Effect and Substance of the Issue? And 'tis not like the Case of collateral Conditions, where the Condition is not to pay Money, but to do some collateral Thing, as to deliver a Horse, a Robe or Ring, &c. or to pay Money to a Stranger; such collateral Conditions are more strictly to be observed, *Vid.*

1 *Inst.* 212.

Rul'd *per Holt* Ch. J. That in Debt *Plene administravit* admits the Debt, but otherwise in an Action on the Case, or in an *Indebitatus assumpsit*, for there the Plaintiff must prove the Debt; and in Proof of a *Plene administravit*, if the Action be Debt on a Bond, and you offer Payment of the Bond, on *Plene administravit*, Proof must be, 'twas a Debt by Bond, that 'twas seal'd and delivered: But to Debt on simple Contract, you need only prove Payment, because if no Bond, 'tis a good Administration in that

Where pleading *Plene administravit* admits the Debt.

Where Sealing and Delivery of the Bond paid, must be proved.

that Action, *Saunderson versus Nicholle, Shower* 81.

In Debt for Rent, Statute of Limitations given in Evidence.

At *Nisi prius* at *Hertford*, it was adjudged *per Holt Ch. J.* That in Debt for Rent upon *Nil debet* pleaded, the Statute of Limitations may be given in Evidence, *Anonymus, Salkeld* 278.

Levy by Distress, & *sic non debet*, Payment or Release is good Evidence, otherwise of Rasure.

In Debt for Rent, if the Defendant plead Levy by Distress & *sic non debet*, a Release or Payment is good Evidence, for it proves there is no Debt, and that is the Issue, *vide Cro. Eliz.* 140. which agrees: But if the Defendant plead Rasure, and *sic non est Factum*, nothing else is Evidence but Rasure, *per Holt Ch. J. Galway versus Susach, Salkeld* 284.

A Release may be pleaded in Debt, or given in Evidence on *Nil debet*.

Per Holt Ch. J. in Debt the Defendant may plead a Release, because it admits the Contract, which is a Colour of Action, and yet he might give it in Evidence upon *Nil debet*. So in *Assumpsit*, the Defendant may plead Payment, because it admits the *Assumpsit*, and yet he may give it in Evidence upon *Non assumpsit*, *Hatton versus Mors, Salkeld* 394.

Dower.

In Dower, the Issue was *ne unques seisie que Dower*, and for the Plaintiff, a Feoffment in Fee was given in Evidence to the Husband, the Defendant would have given in Evidence, a Seisin in Tail with a Discontinuance, and then the Feoffment, &c. and so a Remitter, but it ought to be pleaded; *per Cur. Dyer* 41. Nor an Estate upon Condition.

If an Heir mortgage for Years, and then assign Dower legally, *i. e.* a third Part of the whole, the Assignment shall bind the Mortgagee; *Cont.* if the Assignment be illegal, as

as of one whole Manor when there were three Manors; that being not as the Law would have done it. And if a Disfeisor assign a legal Dower, it's good: But if the Heir mortgage in Fee, and then assign, &c. legally, &c. that is not good, because the whole Freehold was out of him at the Time of Assignment. *Per Hugh Wynham Justice, Bucks, Lent Ass. 1668.*

Dower of Rent, *Hill. ne unque seise que Dower. Dower la, &c. Horton J. S.* granted the Rent to the Husband, payable at *Michaelmas* next, and the Husband died before the Day, and so he was seized in Law, and demanded Judgment. *Thirning*, You shall say generally, *quod seise que Dower la, &c.* and give your Case in Evidence, & *sic bene*, notwithstanding the Doubt of the *lay Gens*, for they ought to credit the Law, and Evidence is not to be pleaded, 11 H. 4. 88.

In Ejectment the Plaintiff made Title by Ejectment. a Recovery in Dower, and produced in Evidence the Record of the Judgment, the *habere facias seisinam, &c.* The Defendant offered to prove a Term of 99 Years subsisting, and that prior to this Title, but it was disallowed; for if he had pleaded this in Bar of the Writ of Dower, yet the Plaintiff must have recovered with a *cesset Executio*; and the Defendant had a proper Time to have pleaded it then, and has slipp'd his Opportunity: Also a Chattel Interest was at Common Law bound by a Recovery in a real Action, so that the Demandant had an immediate Execution, without regard to the subsisting Term: And though by the Statute, H. 8. a Termor may falsify, yet it must be the Termor himself and not another for him, *Lady Dowager Lindsey versus Lord Lindsey, Salk. 291.*

Of Evidence in Ejectment.

The Plaintiff counts of a joint Lease made by *A.* and *B.* In Evidence it appeared that *A.* *B.* and *C.* were Joint-tenants, that *C.* leased to *B.* and that *A.* and *B.* leased to the Plaintiff, by three Justices against two, it's good, 2 Cro. *Jordane's Case*, f. 83.

Ne dona pas may be maintained by a Devise; and upon a Feoffment, a Lease and Release; but a Fine and Release will not maintain a Demise to Husband and Wife.

Elegit.

When he that sued an *Elegit* brings an Ejectment to try the Title, he must in Evidence shew the *Elegit* filed.

Count of a joint Lease made by two, in Evidence it appears they were Tenants in Common; by three Justices against one, it's good, 2 Cro. 166. *Mantle's Case*.

Count of a Lease by Husband, Evidence was a Lease by Husband and Wife with Letter of Attorney to make Livery, and 'tis made in Name of both; by three Justices against one it's good, for Livery as to the Feme was void, 2 Cro. *Gardner's Case*.

Of a Lease made 5 May 10 Regis, *habendum* from Lady-day last past for 21 Years *ex tunc prox' sequent.* In Evidence, a Lease of 5 May 10 Regis, *habendum* from Lady-day last past, for 21 Years next following the Date of the said Indenture, adjudged good and affirmed in Error, *Hob.* 19.

Ejectment of a Rectory, Evidence of the taking of Tithes only, and not entring into the Glebe, the Plaintiff was nonsuit, *Latch.* 62. *Hems and Stroud.*

The

The Rule to confess Lease, Entry, and Ouster, doth not extend to confess actual Entry upon a Lease, that is, the Title; but the Court said, an Entry shall be intended until the contrary be proved of the other Side, *Siderfin* 223.

But he that makes a Lease, or an Assignment of the Lease after the Commencement, must be in Possession, &c.

In Ejectment by Lessee of Lessee of the whole by many Co-heirs, which was made by Reason of the Incertainty of the Part claimed by the Lessors, and *per Cur.* Lease of all Parts warrants Leases of all, *Keble* 2 Part, 700.

If a Trustee of a Lease be Lessor in Ejectment, his Disclaimer in *Pais* will avoid the Plaintiff's Title, 794.

In Ejectment, the Lease of a Guardian or Copyholder, will maintain a Declaration, though void against the Lord and Infant; but a Lease *de Herbage* will not of Meadow, *Hardres Rep.* 330.

Ejectment of a Lease to *A.* of Lands in the Possession of three Tenants for Years, delivered to *J. S.* as an *Escrow*, with Letter of Attorney to enter into all, and then to deliver his Deed, &c. Evidence, that the Attorney entred upon one Lessee in Name of all, and delivered the Deed, &c. *Per Jones* Justice, It's good enough, for where the Freehold is in one, his Entry into one Lessee for Years in Name of all the rest is good, *Latch.* 71. *Dame Argol's Case.*

Where one declares on a fictitious Lease to *A.* for three Years, and within the same Time declares of another fictitious Lease to *B.* of the same Lands, the last is not good. For

Trespass for the mean Profits must be brought in the first Lessee's Name, *ut dicitur*.

In Ejectment the Defendant shall not give in Evidence a former Mortgage or Conveyance made by himself, and therefore in such Cases 'tis left for him that has the former Mortgage to get himself made Defendant before the Cause comes to Trial.

Ejectment of Tithes; a Lease for Life of Tithes is good, if there be Church or Churchyard to make Livery in, resolved in Trial at Bar, *Wheeler versus Hancher*, Hill 14, 15 Car. 2. B. R. v. *Jones* Rep. 321, 322.

Entry and Claim made upon the Land, within five Years after the Death of the Baron of the Countess of *Peterborough* to avoid a Fine, she being Issue in Tail, proved by one Witness, and allowed at a Trial at Bar, B. R. Mich 15 Car. 2. *Floyd and Pollard*.

Custom of Copyholders in extream is to surrender into one Tenant's Hands, in the Presence of credible Witnesses. A Surrender was made accordingly, but presented to be done to another Tenant, yet being proved to be done to a Tenant, it was holden by *Wadham Wyndham* Just. to be good: And by him, a Glove or a Turf is a Rod to give Seisin by, *Maye's Case*, Norf. Summer Assizes, 1663.

A Will under which Title to Land is made, must be shewn it self, and the Probate is not sufficient. *Contr.* if it were on a Circumstance, or as Inducement, or that the Will remain in Chancery, or other Court by special Order of such Court, *Eden versus Chalkhill*, Mich. 13 Car. 2. B. R. *Keble* 1 Part, 117.

Also Inrolment of a Deed, which needs no Inrolment, is no Evidence, *ib.*

He must prove Admission, Institution and Induction, his reading and subscribing the Articles, &c. and his Declaration in the Church of his free and full Assent and Consent to all those Things contained in the Common Prayer, and this ought to be proved done within the Time limited by the Statute, but need not shew a Right in him that presented him.

How a Parson in Ejection of a Rectory shall make out his Title.

See *Keble* 2 Part, 484. In Evidence an Institution without Presentation or Copy of it, was refused by the Court, albeit a Presentation may be made by Parol, but Proof must be made of it; if there be Induction upon it, I think it good Evidence.

The Issue was Fine uncertain, or certain two Years Rent and no more, the Evidence was of Admittances on Surrenders uncertain, but all under two Years Rent. *Per Williams* Justice, you ought to produce Fines on Descent, and Fines paid above two Years Rents 2 *Bulst.* 42. *Allen* versus *Abraham*.

A Lease was made by Parol and agreed to be put in Writing, and Indentures bespoke; but being held for ten Years, and no Indentures executed, it was ruled for a Lease Parol, *Per Berkley* Just. 13 *Car* 1. *York*, *Clayton* 53.

By Justice *Berkley* (1638. *York*, *Hedges* cont. *Clayton* 57.) A Will under Seal, proved, examined by the Original, was allowed good Evidence. *Quære*, I think the Practice against it.

A Lease and Release were given in Evidence to entitle the Plaintiff, and they both were named *hæc Indentura*, but were not indented: Good, *Per Hale's* Chief Baron, *Norfolk*. *Summer Assizes* 1668. *Briant* versus *Trendle*.

After Default (in Ejectment) the Defendant may confess Lease, Entry and Ouster, and may give Evidence, and have all Advantages (except Challenges) and if the Plaintiff becomes nonsuit, any one for the Defendant may pray it be recorded.

Per H. Wyndham Justice, Bucks, Lent, 68. Dr. Crawly's Case. Deprivation in Spiritual Court for Simony disables from bringing Ejectment, because he can make no Lease; yet *quære.*

If Mortgagor continues in Possession without Provision for that Purpose in the Deed, he is Tenant at Will, and if he levies a Fine, it is no Disseisin by him continued in Possession still, because after the Will determined he is Tenant at Sufferance. *Per Hale Chief Baron, Bedford, Summer Ass. 1669.*

Declaration on a Lease made 14 Jan. 30. Eliz. Evidence of a Lease sealed 13 Jan. good, for if it was a Lease 13. it was a Lease made 14. 4 Leon 14.

If the Declaration in Ejectment be of Michaelmas Term which relates to the first Day of the Term, yet 'tis Matter of Evidence, and examinable what Day the Bill was filed; and if it was after the Day of the Lease all is well, *Siderfin* 432.

Feoffments of 40 Years standing, and Possession going accordingly, you need not prove Livery, it may be intended *per Jury, Roll. Rep.* 132.

The common Rock on which so many have split, is laying the Lease to be *a die datus*, and the Entry the same Day, which is a Disseisin, not purged by the Commencement of the Lease; for where an Interest passes, (*a*) is exclusive, and so the Entry the same Day is

is before the Lease was to commence, and is a Disseisin, but in Cases of Obligation where no Interest passes, it is *contra, quod nota.*

In Ejectione, upon Not guilty, upon Evidence to the Jury at the Bar, the Case was such, That *Cotewell* had a Lease for Years of the Prebend of *Sutton Regis* in the County of *Bucks*, made in the Time of *H. 8.* and being expired, he now claimeth under a Lease from a nominal Prebendary thereof founded in the Cathedral of *Lincoln*: But the Plaintiff claimed by Letters Patent thereof from King *James*, made the 7th of King *James*, to *Brent* and his Heirs, who granted the same to the Widow of Sir *W. Rawleigh* and her Heirs, whose Daughter and Heir Sir *Jervis Elways* married; and the Possession was according to this Grant: Whereupon the Question was, if they ought to shew how it came to the Crown? *Hale* Chief Justice said, That the Statute for Confirmation of Patents, *fac.* that Prebend did come to the King. And in *Edw. 1st's* Time was a Device, that all that claimed *Terra Regis* should shew how it came to the Crown, which often vanished away. And in late Times, in a Trial at this Bar, Mr *Latch* did nonsuit the Plaintiff upon the Claim of Monastery Lands, although he proved the House had it, because he did not make out how it came to the House; but since that Time the Court have intended it well come to the House, the Possession having went accordingly with it: And he said he was of Counsel in a Trial at Bar for an Impropriation, where it was insisted it was Presentative till *Edw. 4th's* Time, and could not be appropriated without the King's Licence, *quod Curia concessit*, and he could not produce the Licence, yet because

Pasch 27 Car. 2
in *B.R.* -- vers.
Cotewell.

Monastery
Lands.

Possession.

Copy of a
Leiger Book.

it was enjoyed ever since *Edw.* 4th's Time as appropriate, the Court did intend a Licence, and that the Patent was lost before the Enrolment, and accordingly the Verdict went then. The Defendant offered to read a Copy of a Lease out of the Leiger-Book of the Dean and Chapter of *Lincoln*, but it was disallowed by the Court; for the Book it self is but a Copy, and a Copy of a Copy is no Evidence. And in this Case the Court did presume the Grant to King *James* to be lost, and thereupon Judgment was for the Plaintiff.

What Posses-
sion or Entry
will prevent
the Statute of
Limitations.

In Ejectment on a Trial at Bar, the Statute of Limitations was insisted on, and these Points were rul'd *per Cur.* 1. That the Possession of one Joint-tenant is the Possession of the other, so far as to prevent the Statute of Limitations. 2. That a Claim or Entry to prevent the Statute of Limitations must be upon the Land, unless there be some special Reason to the contrary, 3. If one makes an Answer in Chancery which is prejudicial to his Estate, it may be given in Evidence against him, but not against his Alienee. 4. That a Recital of a Lease in a Deed of Release, is good Evidence of such Lease against the Releasor, and those that claim under him; but against others, it is not without proving there was such a Deed, and it was lost and destroyed. 5. If one Joint-Tenant levies a Fine, it severs the Jointure, but does not amount to an Ouster of his Companion, *Ford versus Grey*, *Salkeld* 285.

Recital of a
Lease in a
Release,
where it is
Evidence.

of

Of Evidence in Trespass.

Upon Not guilty in Battery, *son Assault de- In Battery.*
mesne is no Evidence; for thereby the Battery
 is confessed, 1 *Inst.* 283. Neither is Not guilty
 good Evidence upon *son Assault demesne*.

Upon Not guilty in Trespass, insufficiency Trespass.
 of the Plaintiff's Mounds, or to justify for a Mistake of
 Rent-Charge, Common, Licence, *son Assault* the Day in
demesne, or the like, is no good Evidence, *ib.* is not mate-
 But to prove a Trespass before or after the rial upon E-
 Day laid in the Declaration is good to main- vidence.
 tain the Action, 1 *Inst.* 283.

Upon Not guilty in Trespass, in the Plain- Warren.
 tiff's Warren, Evidence that he hath no War-
 ren is good, 10 *H.* 6. 17. *Kitchin* 119.

Upon Not guilty in Trespass, a Lease for Trespass.
 Years, 12 *H.* 8. 2. or that *locus in quo*, &c. is
 the Freehold of another, 4 *E.* 3. 45. is good
 Evidence; and so of a Gift of Goods; but
 upon this he cannot justify his Entry upon the
 Place by a Stranger's Licence, or Command,
Br. General Issue 81. because this is a Justifica-
 tion by way of Excuse; neither is a Lease at
 Will good Evidence in this Case.

So upon Not guilty in Trespass for Goods, Not guilty in
 'tis good Evidence that the Goods were a Trespass.
 Stranger's, 9 *H.* 6. 11. But that they were
 a Stranger's, and that he as a Servant to the
 Stranger, or by his Commandment, took
 them from the Plaintiff, is not good, *Br. Ge-
 neral Issue* 81. because Trespass is confessed.
 But that the Stranger gave them to the Defen-
 dant is good, 9 *H.* 6. 11. In *Trespass* the But-
 tals must be proved as they are laid.

Trespafs another Day.

If the Trespafs were in Truth done the 4th of May, and the Plaintiff alledgeth the same to be done the 5th of May, or the first of May, when no Trespafs was done; yet if upon Evidence, it falleth out that the Trespafs was done before the Action brought, it sufficeth, 1 Inst. 283.

And so in Indictments, 3 Inst. 230.

If there be two Trespafses, and the Defendant pleads a Justification; if the Plaintiff replies, *de injuria sua propria*, &c. he cannot give in Evidence a Trespafs at another time; but he should have replied, that at another Time, in the same Day of his Count, the Defendant did the other Trespafs, &c. to which the Defendant may plead another Justification, but the Plaintiff cannot then plead a Trespafs at another Time, but must conclude, *Sans tiel cause*, &c. *vide apri.*

If there be two Batteries between Plaintiff and Defendant, at divers Times, the Plaintiff is bound to prove the Battery made the same Day in the Declaration, and shall not be admitted to give another Day in Evidence, as the Case may be: As in Battery the Defendant pleaded *son Assault demesne*, and the Plaintiff replied *de injuria sua propria absque tali causa*; and in Evidence the Defendant maintained, that the Plaintiff beat him the Day mentioned in the Declaration, and in the same Place, which the Plaintiff perceiving, he gave in Evidence, that the Battery was made another Day and Place; to which the Defendant demurred, upon the Difference aforesaid, *Brownlow*, 1 Part, 233. 19 H. 6. 47. But upon Not guilty it is otherwise, though there be never so many Batteries between the Parties, *Littleton*, Sect. 485.

Count of Trespafs done in one Acre, Evidence of Trespafs done but in half that Acre, good, 2 Cro. *Winckworth's Case*.

The Lady *Hatton* brought Trespafs for breaking her Close, and taking away her Horse, &c. against the Defendants; they plead Not guilty, as to the taking of (Her) Horse,

Horse; as to the rest they say, that the Horse of one of the Defendants was in the Close, &c. and they took him out doing as little Damage as they could, *quæ est eadem*, &c. The Plaintiff replies *de injuria sua propria*, &c.

The Evidence was, That the Plaintiff as Lady of the Manor took the Horse as an Estray, and it was cryed and marked, &c. that the Defendants refused to pay for the Meat, and took him away, before the Year and a Day was out.

1. *Per Wadl. Wyndham* Justice of Assize, A Lord may detain an Estray for Meat, yet no Trespafs lies if the Owner takes him, but an Action of the Case lies for the Meat.

2. If the Action had been brought against the Servant only, he must justify, &c. But being brought against Master and Servant, this joint Justification is good.

Cambr. Summer Assizes 1667. Lady Hatton versus Cotes & al.

In Trespafs, the Evidence for the Defendant was, That the Defendant had a Barn, and purchased a Way over the Plaintiff's Land to that Barn; after the Defendant bought other Lands lying contiguous to that Barn on the one Side, and to a Haven on the other Side, and carried Carriages by that Way to the Barn and through it over his own new purchased Land to the Haven. *Per Hale* Chief Baron, If I purchase a general Way to such a Place, I may go from thence on my own Ground whither I please, though I purchase the Ground after the Way purchased, *Summer Assizes, Norf. 1655. Heynsworth versus Bird.*

Trespafs was brought against many, by a School-Mistress, for taking away a Child (her Scholar) with a Scarf of the Mistresses.

Per

per Kelynge Chief Justice. In Trespass for taking (Things) all are Principals that are present and consenting; *Contr.* in taking (Persons) and this Action lies not by the Mistress for the Child, but for the Scarf only, *Lent, Norf. Ass. 1663. Mary Cooper's Case.*

Trespass lies for Lessee in Ejectment on a fictitious Lease to recover mean Profits during the Continuance of that Lease mentioned on Record: And the Recovery shall maintain it. Otherwise if brought by the Lessor, for he is no Party to the Action.

But see *Siderfin* 239. If a Recovery be in Ejectment, and afterwards Trespass is brought for the mean Profits before the Lease, nothing shall be given in Evidence but the Value of the Profits, and not the Title, for otherwise Trials would be infinite.

Also if it be between the Parties, the Record is an Estoppel; and so the Court held it should be if it was against Under-Tenants.

But *Quare*, if the Defendant be one that has a Title, if he cannot give this in Evidence; for otherwise it would be a great Mischief.

Trespass lies not for pulling down a Pew in a Church, fastned to a Pillar with a Chain. *Contra*, had it been fixed by Nails driven into the Pillar, *Per Glyn* Chief Justice, *Trevor's Case.*

Trespass quare fregit liberam Warrenam suam, and took his Conies. In Evidence it appeared that the Plaintiff had Liberty of Chase in the Place; which, though it includes Warren, yet a general Trespass lies not, but an Action of the Case, *Earl of Arundel's Case, Pasch. 1658. B. R.*

Per Earl Serjeant, If Beasts be impounded, and the Key lost, the Officer by Replevin may break the Pound, and deliver the Cattle, *per Stat. Marlebridge*, 52 H. 3. 21.

Tenants in Common must join in Trespafs done against them, so Avowry, *Lead and Lamstead's Case*, 7 Car. B. R. cited by *Finch* in Argument; or Tenant in Common surviving shall have Trespafs.

In Trespafs, the Defendant sets forth conditional Feoffment for Payment of Money at such a Day and Place, and that he paid it accordingly; issue joined on the Payment at the Day and Place, Evidence of Payment before the Day, is not good. *Contra*, had the special Matter been pleaded with Acceptance, *Moor* 47.

In Trespafs with *Continuando* to recover mean Profits, an Entry and Possession of the Land before the Trespafs, must be proved, and also another Entry after the Trespafs.

In Trespafs, the Defendant prescribes to dig in the Common for Clay, to repair ancient Houses holden of that Manor, and good, *Berney versus Stafford*, *Norf. Lent Assizes*, 1667.

In Trespafs they were at Issue on Not guilty, and at the Assizes the Defendant left his former Plea, and pleaded an Accord with Satisfaction; the Judge would have had it replied to and tried presently, but the Counsel refused; whereupon the Jury was sworn, and the Plaintiff nonsuited, *Bedford, Assizes Lent*, 1667. *Green versus Reynolds*. But this was contrary to the Opinion of *Sir Orlando Bridgman*, at the same Assizes, and contrary to 10 H. 7. 21. and 1 Bul. 92.

Tref-

Trespafs lies by Recoveror in erroneous Judgment for a mean Trespafs, because the Plaintiff in Writ of Error recovers all mean Profits, and the Law by Fiction of Relation, will not make a Wrong-doer dispunishable, 13 Rep. Co. 22. but *Contra*, where Act of Parliament restores, &c.

Trespafs for Assault and wounding in *Suff.* The Defendant as to *vi & armis non Cul.* as to the other, Justification of *molliter manus*, &c. in *Norf.* and several Trials, per *Hale* Chief Baron, *Suff. Ass. Summer* 1668. The *vi & armis* cannot be tried till the other be tried. *Contr.* If the first Issue of *non Cul.* was as to the Wounding; and by him Evidence of Livery of Seisin, generally, shall be intended for Life only.

*See Assault
demeſne.*

The Defendant proved the Plaintiff threatened the Defendant by saying, Were it not Affize Time, he would tell more of his Mind, which he said, bending his Fist, and with his Hand on his Sword; yet per *Cur.* This is no Assault, as it would be without that Declaration: But it was farther sworn, the Plaintiff with his Elbow punched the Defendant, which if done in earnest Discourse, and not with Intent of Violence, is no Assault, nor then is it a Justification of Battery after a Retreat, *Keble*, 2 Part, 545.

The Hogs of *B.* were put into the Yard of *A.* and broke into the Land of *C.* and did Trespafs: Action lies against *A.* though the Servant of *B.* did look to them and serve them, by which the Owner had the special Possession of them. So if agisted Cattle do Trespafs, the Agistor shall answer, *Dawtry* versus *Higgins*, *Clayton* 33. per *Barkley*, 11 Car. York.

A. by Indenture of Uses raised an Estate to *B.* in Fee, who regrants Turbary to *A.* by another Deed, and after *A.* levies a Fine to confirm the Estate and Uses abovesaid declared; this doth not touch the Turbary, *per Vernon*, 11 *Car. York*, Clayton 42.

Any one imployed by an Officer, is an Officer within 7 *Jac.* 5. to plead general Issue, and give the special Matter in Evidence, Clayton 54.

Prescription to tether *Equos & Boves* upon such a Balk, *Mares* and *Cowes*, good Evidence within that Prescription, *per Berkley*, Clayton 54.

Per Hale, A Corporation may bargain and sell, though it has been thought an Use upon Use, they being seized to the Use of their House: But I think it rather a Trust than an Use.

If a Justice of Peace send his Warrant to *J. S.* (who is no Officer) to bring one before him, if *J. S.* be no Officer, he is not bound to execute it, yet if he does execute it, it is good, and he may execute it in any Part of the County. And so a Constable of one Town may execute a Warrant in any other Town in the same County, and any such Warrant is as large as the Justices Commission is, *per Hale Norf. Summer Assizes*, 1668. *Wrongrie's Case*.

In Trespass against one for gleaning on his Ground, *per Hale Norf. Summer Assizes*, 1668. The Law gives Licence to the Poor to glean, &c. by the general Custom of *England*, but the Licence must be pleaded specially, and cannot be given in Evidence on *non Cul.*

In *Trespass quare Clausum & Domum fregit & alia enormia ei intulit*; after Verdict for the Plaintiff and 60 *l.* Damages, 'twas moved for
a new

a new Trial by reason of excessive Damages; and upon Affidavit that the Jury intended great Part of the Damages for the Injury the Defendant did to the Plaintiff's Daughter, &c. which came in under the & *alia enormia*, the Plaintiff had Judgment; and a Difference was taken, that Damages *ex turpi causa* may be given in Evidence under this general Clause, & *alia enormia*, but from nothing else, *Siderfin* 225. *Sippora* versus *Basset*.

Joint tenancy in Trespafs cannot be given in Evidence; but must be pleaded in Abatement *Jones* versus *Randal*, *Hill*. 1652. C. B.

In Trespafs for taking Goods after Judgment, *per confession*, *non sum informatus*, or *nil dicit*, Property need not be proved to a Writ of Inquiry; for it would oppose the first Judgment, *quod querens recuperet*, and the Judges might have assessed Damages if they would, *Yelv.* 151. yet *quare*, if the Defendant may not disprove Property in mitigation of Damages; for the Jury may find no Damages.



What ought
to be proved
in Evidence.
Abuttals.

In Trespafs, *quare clausum fregit*, with Abuttals, all the Abuttals and Descriptions must be proved. But if the Abuttal be laid North, &c. and it incline North, though not directly, it is sufficient, & *sic de cæteris*.

Son Assault de-
mesne in Bat-
tery.

If the Defendant plead *son Assault demesne*, in Battery, and the Plaintiff reply *de injuria sua propria absque tali causa*, and so Issue is joined; if there was a Battery at another Day, than what the Plaintiff and Defendant have assigned upon the Plaintiff, and another upon the Defendant by the Plaintiff, the Verdict ought to be for the Defendant; for if the Defendant prove any Assault made upon him by the Plaintiff, this ought to be found for him, although it was at another Day than what

what he hath alledged, for the Day is not material: But upon such special Justification the Defendant hath Liberty to prove his Plea at any Time, and the Plaintiff might have made a new Assignment at another Time, for peradventure there might be several Trespaffes at several Times, to which the Defendant may have several Pleas; and therefore if such Manner of Pleading should not be allowed, and such Evidence, the Defendant could not tell how to help himself, nor could know for what Trespafs the Action is brought, *Vide de vant hic & apres.*

If my Servant without my Consent put my Servant Cattle in the Land of another, I may plead Not guilty, and give this Matter in Evidence; for by putting the Cattle in, the Servant has gained a Property.

In Trespafs for taking a Stack of Corn, the Parcel. Evidence may be of Part, and the Verdict as to four Combs or Bushels, Guilty; and as to the rest, Not guilty.

For making a Trespafs *Continuando*, there ought to be a Re-entry of the Plaintiff, and for the not proving thereof, the Plaintiff shall have Damages only for the first Entry. *Mic. 22 Cor. 1. Continuando.*

In Trespafs, *quare Clausum fregit*, the Defendant says, that *locus in quo, &c.* is six Acres in D. which is his Freehold: The Plaintiff replies, that it is his Freehold and not the Defendant's; the Defendant cannot give in Evidence, other six Acres in D. which are his Freehold, because the Plea shall be intended to refer to the six Acres of the Plaintiff's, *Dyer 23.*

Upon the general Issue, any Thing may be given in Evidence, which proves the Plaintiff had no Cause of Action.

Trespafs.

Trespafs by the Warden of the *Fleet*, upon Not guilty, you may give in Evidence, that he is not Warden, 4 E. 4. 7.

So in Trespafs of a House, that he had no House there, or the Freehold of another, and not of the Plaintiff, is good Evidence upon Not guilty : But in Trespafs of Goods, 'tis no good Plea to say, the Property was in another, although it is in a Replevin ; and therefore it seems to be no good Evidence in Trespafs, because Possession maintains the Action against all but the Owner ; but that the Property was in a Stranger, and he gave them to the Defendant, is good. But in Trover that they were not the Goods of the Plaintiff, is good Evidence, 5 H. 7. 3.

Cessavit.

Cessavit and Count, that of divers Lands held by entire Service, upon *non tenuit modo & forma*, held by several Services, is good Evidence, for he had no such Cause of Action, 10 H. 7. 24.

Regula.

Upon the general Issue, for the Defendant by Evidence to convey to himself the same Interest and Title, is good Evidence.

Trespafs.

As in Trespafs of Goshawks, Not guilty, and Evidence, that he had a Lease of that Wood for Years where they were taken, is good, for it is his Title.

Account.

Account of Receipt, by the Hands of J. S. the Defendant pleads *ne unques son Receiver*, and Evidence that J. S. gave this to him, is good, 2 H. 4. 13. So in Trespafs a Lease for Years, Tenancy at Sufferance (but not at Will,) that they were a Stranger's Goods, who gave them to the Defendant, is good Evidence upon Not guilty, 22 Aff. 73. because
by

by these Matters he makes himself a Title, & *sic de cæteris*.

Upon the general Issue, if by the Evidence the Regula. Defendant acknowledge that he did the Wrong, and justify this, and gives Matter that goes to discharge him of the Act by Justification, this Evidence is not good, but he ought to have pleaded it.

This Rule is demonstrated by those Cases, where, upon Not guilty in Trespafs, the Defendant would say the Property was in a Stranger, and that by his Commandment, or his Servant, he took the Goods. Not guilty, and that he did the Battery *se defendendo*. Not guilty in Maintenance, and lawful Maintenance. Insufficiency of Mounds. The Freehold of a Stranger, and his Licence. A former Recovery in another Action. So for Common, Rent-service, Rent-charge, Licence, &c. cannot be given in Evidence upon the general Issue; for these Matters in Evidence are Justifications, which go in discharge of the Party, but not by Title, but by Justification.

So where an Imprisonment or Entry is given by Authority of Law, or by Authority from any Party, as for an Imprisonment, by the Statute Trespaffers in Parks, putting a Man off his Ground, thrusting a Man out of Church that troubles the Congregation in Service, parting an Affray, and keeping the Quarrellers apart, in Defence of himself or his. Entry in Perambulation. Entry to amend his Gutter leading to his House, as of ancient Time had been used. That it was a common Inn. That he put in his Cattle by the Plaintiff's Agreement. That he entred and took the Emblements after the Death of the Tenant for Life. That the Plaintiff owed

him Money, and by his Invitation he went into his House to receive it. That he took the Goods as a Herriot, Waif, Eſtray, or Wreck. Or the Plaintiff took away the Defendant's Cattle, and he entred into the Cloſe where they were, and took them again. That he took the Cattle Damage-feſant in his Ground, or for an Amercement in a Leet, &c. That the Goods were the Goods of J. S. who delivered them to the Plaintiff to keep, and J. S. commanded the Defendant to take them; or excuse it, that the Plaintiff delivered them to him. That he took them by a Writ. That as Schoolmaſter he gave moderate Correction. Theſe are Excuses and Juſtifications without Title, and therefore muſt be pleaded, and cannot be given in Evidence upon Not guilty.

So in an Action *de malefactoribus in parciſ*, he cannot plead Not guilty, and give a Licence in Evidence. So in an Appeal, if he plead Not guilty, and ſhews that he was Sheriff, and executed his Office, or that he was Foreſter, and killed him becauſe he fled, and would not ſubmit, *Vide* 12 H. 8. f. 1. The beſt Caſe of this Matter.

Trespafs.

In Trespafs for Goods taken, the Defendant, upon Not guilty, in Mitigation of Damages, may give in Evidence, That the Plaintiff had his Goods again, 11 H. 4. 24. 19 H. 6. 34.

False Imprisonment.

Upon Not guilty, the Defendant gave in Evidence, That by the Plaintiff's Agreement he carried him from D. to S. and held good, becauſe, what is done by the Plaintiff's Agreement, is no Imprisonment, 14 H. 6. 2.

Upon

Upon not guilty, the Defendant faid, his Master locked the Plaintiff into a Chamber of his Houfe, and gave the Defendant, being his Servant, the Key to keep, 22 E. 4. 45.

Tenant for Life leafeh for Years, who is ousted, and the Tenant for Life is disseized: The Disseisor leafeh for Years, who sows the Land; the Tenant for Life dies; he in Remainder in Fee, brings Trespafs against the Defendant's claiming the Emblements by the Lessee of the Disseisor. Adjudged, That they had not the meer Right but in respect of their Possession, they should bar the Plaintiff, who had no Right; and that the meer Right was in the Lessee of the Tenant for Life, and that he might bring Trespafs against the Lessee of the Disseisor, and recover all the mean Profits. But as to the Entry into the Land to take the Emblements, this was good Matter of Justification: But in regard it was not pleaded, it could not be given in Evidence upon Not guilty; and therefore the Plaintiff had Judgment for the Entry, and was barred for the Residue. *Note*, That the Lessee of Tenant for Life had Right to the Land, and by Consequence to the Emblements, as Things annexed to the Land, and the Death of the Tenant for Life, determines his Interest to the Land, but his Right to the Emblements remains.

Trespafs, concerning the Rectory of Norton-Pinckney, which belongs to Oriel College in Oxford. The Issue was, if there was a Vicaridge indowed there, or only a stipendary Curate. *Note*, *Leon.* 3 Part, 210. If the Parties admit a thing *per nient de-*dire, the Jury is not bound by it; but where upon the Pleading a special Matter is confessed, the Jury shall be bound by it.

1. All agreed. That if a Vicaridge be erected and established if there was no Endowment *de facto* of the Vicaridge, the Vicar could not claim any Thing.

Impropriation.

2. There was shewed an Impropriation, by the Licence of the Pope, made in the Time of E. 2. *Dodderidge* said, That was not good. *Jones*, *è contra*. And it will be perilous to such ancient Impropriations, if now the Consent of the King must be shewed; and at that Time it was taken good by the Assent of the Pope without the King. *Dodderidge* denied that the Pope without the King at that Time, could make an Impropriation with the Ordinary and Patron. But *Crew* agreed with *Jones*. And in Things of such Antiquity *omnia præsumuntur solemniter acta*, and said, that so it was ruled in a Case before: And *Jones* said, it was nothing to the Vicar, for the Vicaridge may be endowed without the Consent of the King, and 'tis not *Mortmain*. *Palmer's Reports* 427. *Erasmus Cope's Case* against *Bedford*.

Hors de son Fee.

Where *hors de son Fee* is pleaded, a Release of the Seigniory, is good Evidence, 8 E. 2. 262.

Trespafs.
Freehold.

In Trespafs against two, for entring into the Plaintiff's Land, if one pleads his Freehold, and the other that he entred by the Commandment of him that pleads it is his Freehold, here is to be but one Issue joined, *viz.* by him that claims the Interest, for upon the Issue all depends: If it be found against him, his Servant has no colour.

Battery.

Assault.

In Assault and Battery, if the Plaintiff prove only the Assault, he shall recover, for an Action of Trespafs lies for an Assault. Of an Assault and Battery, Assault and Menace,
&c.

&c. See Roll. tit. *Trespass* 545. F. N. B. 91. a.
&c.

To lay Hands gently upon the Shoulders of a Man, and say that is he against whom the Justices Warrant is: Or to serve him with a *Subpoena*, proves no Battery.

These Things following are good Justifications, but cannot be given in Evidence upon the general Issue.

Correction by the Parties, Master, Schoolmistress, Apprehension of a common Cheater at Dice, *Molliter manus imposuit*, upon one setting a Dog upon him. Beating one by the Husband in Defence of his Wife; by the Master in Defence of his Servant; or by the Servant in Defence of his Master. Holding a Man that cometh to stop the River to his Mill; or to throw down his Booth. Inevitably discharging his Musket in the Plaintiff's Face at a Muster. Beating one in Defence of his Possession of his Goods, House, Lands, Goods distrained, &c. By a Forester, of one who resisted in the Forest. That he imprisoned another to prevent Mischief. As the killing of another with whom he was fighting, (not wrangling with Words) until the Fury be over.

Lunacy will not excuse in Battery, although it will of Felony.

Note, a Man may justify an Assault and Battery, but not wounding or maiming of Life or Member, or Mayhem, in Defence of the Possession of his Lands or Goods, 2 Inst. 316.

An erroneous Process to an Officer out of a Tenant in Court, having Jurisdiction, in aid of the Bailiffs. That the Executor entred the Plaintiff's Ground to take the Testator's Timber there. That he had a Piscary, and put Stakes in the Soil. Taking his Goods stolen, in the Plaintiff's House, upon fresh pursuit. Entering his Soil to throw down a Nuisance. Or to take my Cattle, which the Plaintiff put in his Ground. To throw down the Plaintiff's House on Fire, next mine. Breaking his Windows or

Tenant in Common cannot justify to enter into his Companions Ground to take the Horse they have in Common, altho' he may take him elsewhere.

House to get out, where he imprisoned me. To take a handful of Grain out of his Heap, who took one out of mine, and threw it into his. To carry away his Grain or Money which he threw into my Heap. To chase his Cattle with a Dog out of my Ground, Damage-tenant. To throw that into the Plaintiff's Ground which he threw into mine. That my Cattle took a mouthful, &c. of his Grass passing in the Way I had over his Ground, against my Will. Throwing Goods into the *Thames* out of a Barge, to save the Lives of the Passengers. To fetch out of the Plaintiff's Ground, the Trees he granted me. To dig his Ground to mend my Pipe there. That I hunted Cattle out of my Ground with a Dog, which against my Will run into his Ground, I rating and recalling him. A Prescription to cut Grass in the Plaintiff's Ground lying nigh the Church, to estrow the Church, being but an Easement.

Distress by a Stranger as Bailiff, and the Assent of the Party. By the Command of the Chief Justice, Order of Chancery, &c. *Roll. tit. Trespass* 559. That the Plaintiff ought to impale against a Forest; and for Default of Pales, the Beasts went in, and the Forester fetched them out.

These are Justifications and Excuses that must be pleaded, and cannot be given in Evidence upon Not guilty, unless it be in Mitigation of Damages.

Trespass.

Trespass lies for Goods stolen, although the Thief be convicted of Felony, *Latch* 144. *Markham's Case*, and so I knew my Lord *Hale* held, although in *Roll. tit. Trespass* 557. 'tis said, if it appears on the Evidence that it was Felony,

Felony, Trespafs lies not. Which I think is Felony. not Law.

A Man who fows the Lands to halves with Sows to the Owner, or three agree to fow the Land, halves. where two of them have no Interest, and a Stranger take the Corn, they cannot join in Trespafs, having no Interest but an Agreement, but the Owner only must bring the Trespafs, *Cro. 3 Part, 143. Goldsb. 77.*

Upon reversing an Outlawry, the Party is restored, and may have Trespafs; but upon reversal of a Judgment the Party shall only be restored to the Money for which the Sheriff sold his Term, upon a *Fieri fac.* *Cro. 3 Part, 270.*

Outlawry reversed. Tenancy in Common. Where. Tenants in Common shall join in an Action and where not, and what Actions the one shall have against the other.

Upon Not guilty in Trespafs, *quare Clausum fregit*, at the Trial the Defendant shall not say, that the Plaintiff is Tenant in Common; he should have pleaded this, and hath now lost this Advantage; and if the Jury find it, their finding is not material, *Cro. 3 Part, 554.*

A Man sells all his Woods standing, growing, &c. upon the Premises, to hold during the Life of the Vendor, rendring Rent; the Vendee cuts down all the Trees: If he cuts Wood afterwards growing in the same Place, the Vendor may have Trespafs, *Leon. 3 Part, 7.*

See 1 Inst 197, 200, &c. Woods.

Trespafs lies for a Copyholder against the Copyholder. Lord for cutting down Trees, that he the Tenant ought to have for Repairs, *Godbolt 173.*

By seizure of an Estray, the Lord hath but Estray. the Custody and not the Property, and therefore if he Works the Horse, Trespafs lies, *Yelverton 96, 97.*

Trespafs with a *Continuando*, cannot be for taking a Horse, nor ten Trees, &c. nor without a Re-entry of the disseised, unless his Re-entry be taken away by the Act of God, or the Estate

Continuando.

Estate be determined so as he cannot enter; as if Tenant *pur auter vie* be disseised, and *cestuy que vie* die, for there his Entry is taken away by the Act of God; otherwise if it be taken by his own Act, as if he release to the Disseisor, &c. 19 H. 6. 28.

Upon *non cul.* No Park by Prescription or Grant is good Evidence, 18 H. 6. 22.

Parco fracto.
Park.
Warren.

General Trespafs for breaking his Park, and taking his Deer, &c. doth not lie at Common Law, but a Writ is given by the Statute *West. 1. cap. 20.* So if *A.* have a free Warren in the Soil of *B.* *A.* shall not have Trespafs, but Case for entring the Warren and stopping the Holes, &c.

Commoner.
False Imprisonment.

A Commoner cannot have Trespafs for the Grass. After a *Superfedeas* shewed to the Bailiffs, false Imprisonment lies against them, not against the Sheriff; so against the Bailiff of a Franchise, if he take other Mens Goods in Execution upon the Sheriff's Warrant; not against the Sheriff, nor against the Party, unless he procure the Bailiff to take the Wrong.

Possession.

He that hath the Freehold in Law, unless he hath actual Possession, cannot have Trespafs; therefore the Heir cannot have Trespafs against the Abater, nor against the Tenant at Sufferance before he hath entred, and only from that Time: But an Executor or Administrator shall, by Relation, have Trespafs from the Death of the Intestate, &c. But a Disseisee after Entry, shall have an Action for all mean Trespafses from the Disseisin, even against Strangers, for he is restored to the Possession *ab initio.*

Relation.

Trespafs

Trespafs cannot be maintained against him who comes by the Goods lawfully, as by the Plaintiff's Delivery, or under that, or by Act in

in Law, &c. but Detinue. But Trespafs lies against Tenant at Will, or him that I lend my Goods to, who destroys them ; for thereby the Privy is determined It lies against a Miller for taking Toll where none is due ; for taking my Servant out of my Service ; for rescuing one taken at my Suit out of the Bailiff's Hands, for the Bailiff is my Servant. For beating my Wife or Servant *per quod*, &c. Not against him that J. S. sells my Horse to, or has my Goods from the Sheriff, although the Sheriff took them wrongfully. It lies for hunting a Fox, &c. in my Ground. Against Churchwardens, who act by the Justices of the Peace's Warrant, if the Warrant be not good.

For digging so near my Ground that it fell into the Defendant's Pit : But not that my House fell into the Pit, for 'twas my Fault to build so near another Man's Ground : For entering my Ground, to take out his Falcon, which flew thither after Game. For killing my Tumbler in his Warren.

Although I sell the Goods, it lies for a Trespass Time. done before. Tender of sufficient Amends before the Action brought, is a good Bar for a negligent Trespafs, not for a voluntary one.

If a Man enter into a Place by Authority *Ab initio*. of Law, and abuse this Authority, he is a Trespasser *ab initio*, for his first Entry shall be intended for this Purpose. As if the Lessor enter to view Waste, and stay all Night. If the King's Purveyor sells my Goods. If the Searcher abuses my Stuff. If a Man will stay in a Tavern all Night. If he detains a Distress after Amends tendred before impounding. If a Bailiff refuse Bail, Trespafs doth not lie against

against him *ab initio*, but Case; for the Sheriff or Under-Sheriff, not he, ought to take Bail; not against the Party nor Bailiff, or Person in aid, if the Sheriff doth not return his Writ of *Latitat*, or makes a false Return; but it doth against the Sheriff: So of an Officer of an inferior Court.

If the Lord work an Estray, Distress, &c. or Executors find a Bond and cancel it, thinking it was discharged and it was not; they are Trespassers *ab initio*, although they came lawfully to the Possession at first, *Roll. tit. Trespass*, 563.

Lunatick.

The Lunatick (and not the Person to whom he is committed) must bring the Action in his Name for a Trespass done in the Land, *Brownl. 1 Part*, 197.

In Trespass on Not guilty, the Defendant cannot give Evidence, that the Place was a High-way.

In Trespass *quare Clausum fregit*, Not guilty was pleaded; and on Trial the Defendant gave Evidence, That it was in a High-way. *Et per Cur.* It is a special Justification, and ought not to be allow'd to be given in Evidence on the general Issue. *Holt* said, in Case for disturbing the Plaintiff of his Common. Upon Not guilty pleaded, he had known the Defendant permitted to give in Evidence, That he had a Right to Common there, but he never thought it right, and had never allowed it, *Watson versus Sparks, Salkeld* 287.

Of Evidence in Trover.

Upon Not guilty in Trover and Conver-Trover.
 sion, a Demand and Denial of the Goods,
 is good Evidence of the Conversion; but
 when the Goods come to the Defendant by
 Trover, there must be an actual Demand and
 Denial, *Plow.* 14. *lib.* 10. 57. *Cro.* 1 Part, *ult.*
pub. 495. *Hob.* 187. *Moor* 460. *Abridg.* *Roll.* 5.

Upon Not guilty in Trover, the Defendant Trover.
 may give in Evidence, That the Goods were
 pawned to him for 10 *l.* that he distrained
 them for Rent or Damage-feasant: That as
 Sheriff, he levied them upon Execution, or
 that he took them as Tithes severed, *Cro.*
 1 Part, 157. 3 Part, 435. *Hob.* 187. A De-
 mand and Denial of the Goods is Evidence
 of a Conversion.

The Citizens of *London* gave in Evidence
 their Custom to take Toll, *Jones* 240.

In Trover for an Horse proved of 15 *l.*
 Value, the Jury gave but 3 *l.* Damages, upon
 Mistake, they thinking that the Plaintiff had
 his Horse again.

Per Wadlb. Wyndham, If the Jury had not
 been gone, they should have mended their
 Verdict; but a new Action of Trover lies for
 Damages for the Horse, in which the Jury
 shall prove the 3 *l.* given was only for the
 Conversion, not the Value of the Horse; and
 by him, Trover lies for Goods in the Plain-
 tiff's Possession, to recover Damages for the
 Conversion only, *Tyndal* versus *Folliffe*, *Norf.*
Lent Assizes, 1660.

In Trover by Administrator, where the
 Conversion was in the Time of the Intestate,
 the Plaintiff must shew the Letters of Admini-
 stration,

stration, *Contr.* where the Conversion was after his Death, *Per Hale, Norf. Sum. Ass. 1660.*

If an Estray be claimed within the Year and the Day, &c. and the Lord refuses to deliver it; Trover lies, though the Keeping is not paid for, and the Lord says, he detains for the same; and the Lord cannot detain for the Meat, &c. but must bring his Action, *Per Moreton Justice, Lent Ass. Norf. 1667. Bond vers. Paston, Quære: Vide Dent. tit. Trespass; per Wyndham contr. and I think is Law, vide Roll. tit. Estray 889.*

At the same Assizes *Daniel versus Berney*, by *Moreton Justice*, Proclamation may be made of an Estray by any Person, and it is not necessary that it should be made by the Bell-man or any other Officer, *vide Co. Entries 170. Barber versus Fawcet.* In Trover, Issue was joined on Tender of Amends for keeping, &c. and Verdict *pro Plaintiff* and Judgment.

Note, I find Precedents, that in Trover the Matter of an Estray may be pleaded specially, or given in Evidence on Not guilty.

Oats were taken from the Owner, and carried to a Miller to make into Oat-meal; and before it was done, the Owner prohibits the Miller, &c. and demanded the Oats, who notwithstanding made them into Oat-meal, *per Berkley*, it is a Conversion in the Miller, 1638. *Clayton 57. Holsworth's Case.*

On non Cul. The Defendant gave in Evidence, a Seizure for Goods foreign bought and foreign sold. *Per Custom of Lynn, Norf. good, per Hale, Norf. Sum. Ass. 1668. Harwich versus Twells.*

A Man lends his Horse to a special Purpose, the Bailee abuses the Horse, and overworks him, then the Lender takes the Horse again.

again. *Per Hugh Wyndham Justice, Lent Assizes, Bucks.* Trover lies not, *Constable's Case.*

Actual prisel est bone Evidence de prover Conver- Trover.
sion sans demand, Siderf 264.

In Trover for Goods, the Proof depended Record.
on a *Fieri facias*, and *venditioni exponas*, which
could not be found on Record, and admit-
ted to be proved in Evidence, *Hardres Rep.*
323, 324.

A Seizure and Condemnation in the Exche- Trover.
quer of forfeited Goods, may be given in Trespass,
Evidence upon Not guilty in Trover, but it *Vide Roll.*
must be pleaded in Trespass. In Trover of a *1 Part, 1, 2.*
Horse, that he is a common Hostler, and A Custom
that the Horse was put to him at Livery and pleaded in
died, is good upon Not guilty, *Roll. 1 Part, 22.* Trover to
take Corn

Per Dodderidge, In Trover and Conversion to repair a
of Goods, if the Defendant derive a Title Bridge, and
from a Stranger, this amounts to the general *Cro Eliz. 433.*
Issue, otherwise if from the Plaintiff, *Latch* and 262. *Pro-*
186. And Bailment of the Goods to deliver mise.
to another, and Delivery accordingly, amounts
to the general Issue, and may be given in E-
vidence upon it, *Bulst. 3. Part, 209.*

If a Carrier lose Goods, a special Action of Trover a-
the Case lies against him, but not Trover, *Roll.* against a Car-
Abr. 6. so of a common Carrier by Boat, *Noy* rier.

114.

Brown versl. Hedges, Trin. 7. A. B. R. In Declaration
Trover upon Not guilty pleaded, it appeared of a Trover
in Evidence, That the Defendant was Te- in *Middlesex,*
nant by the Curtesy of Lands in *Ireland,* and Proof of
had cut down and sold the Trees off the E- one in *Ireland,*
state, and that the Reversion belonged to the good.
Plaintiff, and two others in Coparcenary:
Upon a Case made for the Opinion of the
Court, it was resolved, That in local Actions,
as in Trespass *quare Clausum fregit,* the Plain-
tiff

One Joint-tenant cannot bring Trover against his Companion, but may against a Stranger, and it is only pleadable in Abatement.

Sentence of the Spiritual Court, in a Cause within their Jurisdiction, is conclusive Evidence in the Point tried; otherwise of a collateral Matter.

tiff cannot prove a Trespass but where he lays it, nor lay it in any other Place but where it is; but it is otherwise in Actions transitory as Trover: *Ergo*, here he may lay the Conversion here and prove it in *Ireland*, *vide Stile* 331.
2. One Joint-tenant or Tenant in Common or Parcener, cannot bring Trover against another; if he does, it is good Evidence upon Not guilty: But if one Joint-tenant brings Trover against a Stranger, in that Case the Defendant may plead it in Abatement, but cannot take Advantage of it in Evidence, 2 *Lev.* 113. *Cro. Eliz.* 554. *Salk.* 290.

In Trover upon Evidence at a Trial before *Holt* Chief Justice, at the Sittings in *Middlesex*, the Case was, the Plaintiff proved the Goods to be in his Possession, and to be taken away by the Defendant. The Defendant shewed that these were the Goods of *Fane Blackham* in her Life-time, and that the Defendant had taken out Letters of Administration to her, and so was entitled to the Goods: Upon this the Plaintiff proved, That some few Days before her Death she was actually married to him: And in Answer to that it was insisted, That the Spiritual Court had determined the Right to be in the Defendant; for they could not have granted Administration to the Defendant, but upon supposing there was no such Marriage, and that this Sentence being of a Marriage within their Jurisdiction, was conclusive, and could not be gain-say'd in Evidence. *Et per Holt*, Chief Justice. a Matter which has been directly determined, by their Sentence, cannot be gain-say'd. Their Sentence is conclusive in such Cases, and no Evidence shall be admitted to prove the contrary, but that is to be intended only in the Point

Point directly tried; otherwise it is if a collateral Matter is collected or inferred from their Sentence; as in this Case, because the Administration is granted to the Defendant, therefore they infer that the Plaintiff was not the Intestate's Husband, as he could not have been taken to be, if the Point there tried had been married or unmarried, and their Sentence had been, Not married. *Sal-keld* 290. *Blackham's Case*.

Of Demurrers upon Evidence.

Middleton against *Baker*, *Cro. Eliz.* 42. f. 751. In Ejectment, it was held by all the Court upon Evidence to a Jury, That if the Plaintiff give in Evidence any Matter in Writing or Record, or a Sentence in the Spiritual Court, (as it was in this Case) and the Defendant offers to demur thereupon, the Plaintiff ought to join in the Demurrer, or wave the Evidence, because the Defendant shall not be compelled to put Matter of Difficulty to lay Gens, and because there cannot be any Variance of a Matter in Writing. But if either Party offer to demur upon any Evidence given by Witness, the other, unless he pleaseth, shall not be compelled to join, because the Credit of the Testimony is to be examined by a Jury, and the Evidence is uncertain, and may be enforced more or less; but both Parties may agree to join in Demurrer upon such Evidence. And in the Queen's Case, the other Party may not demur upon Evidence shewn in Writing or Record for the Queen, unless the Queen's Counsel will thereto assent; but the Court in such Case shall charge the Jury to find the Matter specially, as appears 24 H. 8. *Dyer* 53. But this is by Prerogative.

Joinder in
Demurrer.

Vide Lib. 4. 104 the same Case, and *1 Inst. 72.* where my Lord *Coke* says, if the Plaintiff in Evidence shew any Matter of Record, or Deeds, or Writings, or any Sentence in the Ecclesiastical Court, or other Matter of Evidence by Testimony of Witnesses, or otherwise, whereupon Doubt in Law ariseth, and the Defendant offer to demur in Law thereupon, the Plaintiff cannot refuse to join in Demurrer, no more than in a Demurrer upon a Count, Replication, &c. and so, *è Converso*, may the Plaintiff demur in Law, upon the Evidence of the Defendant, but the King's Counsel shall not be enforced to join in Demurrer; but in that Case the Court may direct the Jury to find the special Matter. So that the several Sorts of Evidence make no Difference as to the joining in Demurrer, *1 Part, Leon 206.*

Darrose against Newbott. Cro. 4 Car. f. 143. In Error of a Judgment in *Bridgewater*: The Error assigned was, for that, in an Action upon the Case *sur Assumpsit*, the Parties being at Issue, a Demurrer was joined upon the Evidence, and thereupon the Jury discharged, and afterwards Judgment was given for the Plaintiff, and a Writ of Inquiry of Damages awarded, and Damages found, and Judgment thereupon; where the Jurors which came to find the Issue, although by the Demurrer they were discharged of the Issue, yet ought to have assessed Damages conditionally, if Judgment should be given for the Plaintiff. And in Proof thereof, was cited *Newis* and *Scholastica's Case, Plo. Com. f. 408.* and the old Book of Entries, &c. And it was said by the Court, if these Precedents be good Law, then it may be enquired of by the same Jury condi-

conditionally : But it may be as well inquired of by a Writ of Inquiry of Damages, when the Demurrer is determined, and the most usual Course is, when there is a Demurrer upon Evidence, to discharge the Jury without more Inquiry. But as my Lord Chief Baron *Montague* held at the Assizes in *Cambridgeshire*, 1682. it may be one Way or other.

Note, He that demurs upon Evidence, admits the Evidence to be true.

In the Assize by *R. Newis* and *Scholastica* his Wife, against *Lark* and *Hunt*, which was taken by Default. The Precedent in *Plowd. Com.* as to this Matter runs thus,

‘ Recogn’ Assisæ præd’ exacti venerunt qui ad
 ‘ veritatem de præmissis dicend’ electi triati &
 ‘ jurati fuerunt super quo Willielmus Ben-
 ‘ lows Serviens ad legem de consilio prædicto-
 ‘ rum R. & Scholasticæ in manutentione As-
 ‘ sisæ prædict’ coram Justic’ Dom’ Reg’ de Banc’
 ‘ hic in evident’ Recogn’ Assisæ præd’ dixit quod
 ‘ diu ante diem impetrationis Assisæ præd’ quidam
 ‘ H. Clark fuit seistitus, &c. Et condidit te-
 ‘ stamentum & ultimam voluntatem suam in
 ‘ scriptis inter alia unde pars inde in hiis Angli-
 ‘ cis verbis sequitur videlicet [*Also this is the*
 ‘ *last Will and Testament of me the said Henry*
 ‘ *Clark, for and concerning, &c.*] Et ulterius i-
 ‘ dem Serviens ad legem ex parte præd’ R. & S.
 ‘ dedit in evident’ ejusd’ Recognit’ quod, &c.
 ‘ Quorum prætextu idem jam Serviens ad legem
 ‘ exigit quod iidem Recogn’ Assisæ præd’ Assi-
 ‘ sam præd’ de tenementis prædict’ cum pertin’
 ‘ in visu, &c. pro parte ipsorum K. & S. triari
 ‘ & comparere debeant, &c. Et veredictum suum
 ‘ dare debent quod præd’ W. Lark & J. Hunt
 E e 2 dictos

dictos R. & S. de tenementis præd' cum pertin'
in visu, &c. disseisiverant, &c.

Et præd' W. Lark & J. H. in propriis personis suis dic' quod evident' & allegation' prædict' ex parte præd' R. & S. superius allegat' minus sufficien' in lege existunt ad manutenend' Assisam præd' ad quos ipse necesse non habet nec per legem terre tenetur respondere unde pro defectu sufficient' Evident' in hac parte pet' Judicium quod Juratores præd' de veredicto suo in præmissis dicend' exonerentur, &c. Et quod præd' R. N. & S. ab Assisa sua præd' habend' præcludantur, &c.

Et præd' R. & S. dicunt quod ex quo ipsi sufficien' materiam in manutentione Assisæ præd' in Evident' recognit' præd' ostend' quam quidem materiam præd' W. Lark and J. Hunt non dedicunt nec ad eam aliqualit' respond' petunt Judicium & quod iidem Jurator' inde exonerentur, & quod præd' W. & J. de Assisa illa convicantur, &c. Super quo dict' est Recogn' præd' quod inquir' quæ dampna præd' R. & S. sustinuer' tam occasione disseisinæ prædict' quam pro misis & custagiis suis per ipsos circa sectam suam in hac parte apposit' si conting' Judicium pro iisdem R. & S. in placito præd' super evidencias prædict' reddi Qui quidem Recogn' dicunt supra sacram' suum quod si conting' Judicium in placito præd' pro præd' R. & S. super Evidencias prædict' reddi, iidem R. & S. sustinuer' dampna occasione disseisinæ præd' ad 13 s. 4 d. & pro misis & custagiis suis ad 20 s. Et quia Justiciarii hic se advisare volunt de & sup' præmissis priusquam judicium inde reddant, dies datus est partibus prædict', &c.

Note,

Note, Several Exceptions were taken to the Manner of giving the Evidence; First, for that the intire Will was not shewed, but Part, and that this being the Foundation of the Evidence, the whole Will ought to have been shewed; for there might be some other Matter of Substance, as a Condition, Limitation, &c. in the Parts not shewed. But all the Justices disallowed this Exception, and said, the Party in any Title or Bar, needs shew no more than what makes for him. As in an Act of Parliament, in which are divers Branches, 'tis sufficient to shew that Branch which serves one's Purpose, and not like the Case of a Fine or Recovery of twenty Acres, where I must shew the whole Record, although I am concerned but in one Acre, because the Original is intire, and so is the Record grounded upon it. See also *Fulmerston and Steward's Case, Plo. Com. 102.* Another Exception was, That the Fine was not shewed under the Seal of the Court, or the Great Seal, but one Part indented of the Chirograph was only shewn, which the Jurors were not bound to believe, because it wanted a Seal. But all the Justices were against this, and said, the Jury might find the Fine of their own Knowledge, without the shewing of the Parties, or they might find it upon the Credit of any Witness that had seen it, and the shewing the Part indented, is the usual Evidence of a Fine. (*Note,* a Fine indented and not exemplified under Seal, &c. shall not be delivered to the Jury, 34 H. 6. 25.) And they said, because it is only the Inducement of the Verity to the Jurors, the Party could not demur upon this; for the Effect of the Matter is, that there is such a Fine which is amongst
E e 3 the

the Records : And this is the Substance of the Matter, and the Part of the Chirograph is nothing but the Image of the Verity, and therefore there could be no Demurrer upon this.

Another Exception was, That the Recovery was not shewed under Seal, or at least that the Roll of this ought to be alledged certainly ; but all the Court (except *Harper*) answered, That upon the general Issue, the Jury might find Things that proved or disproved the Seisin or Disseisin, be they Matters of Record or otherwise, and the Jury could not give a rightful Verdict, if they could not find them ; and whatsoever they may take Conuſance of themselves, may be given in Evidence by Words, or Copies, or other Argument of the Truth. 'Tis true, in Pleading, a Man cannot make a Title by Record, without shewing the same under the Great Seal, and if a Record be pleaded in Bar, a Day may be given to bring in the Record under the Great Seal ; but such Day cannot be given to bring in the Record upon Evidence, but the finding of it by the Jury is sufficient, and they may find it of themselves, although it be not shewed them in Evidence. But perhaps they shall not be bound upon Pain of Attaint to find it, if it be not shewed them under Seal ; but nevertheless they may find it, and they do well, if it be true. And by the same Reason that they may find, they may take Instruction of it by any Circumstance, which induceth the Truth. (*Note*, if it be not necessary to shew the Record, and the Jury may find it without ; yet 'tis not fit to be permitted to prove it in such a Manner, without shewing the Record, or a true Copy of it.) And the Demurrer

*Style 22.
White and
Pindar's Case.*

*Vide Roll. tit.
Trial 687.*

Demurrer upon Evidence goes to the Law upon the Matter, and not to the Verity, which is admitted, and the Effect in Law is denied; for if the Party will not confess the Truth of the Matter given in Evidence, then he ought so to say, and put it to the Jury to be tried, and if they find this, where it is false, an Attaint lies; but a Demurrer upon Evidence never denies the Truth of the Fact, but confesses the Fact, and denies the Law to be with the Party which shews the Fact.

As to a fourth Exception, for want of alleging and averring, that *H. Clark* had not any other Issue Male than *John* and *F.* (upon a Limitation of a Remainder for want of Issue Male of *H. C.* and a Title made to the Plaintiff's Wife, under that Limitation;) the same Judges answered, That which the Plaintiff gave in Evidence, is to the Intent to persuade the Jury, that they have a good Title, and what they say shall be applied as they intended; and as by Presumption, no Man will say any Thing against himself so it lies on the other Side to shew what is against him; and although in Pleading Certainty ought to be shewed, (to which the other Party must answer, and upon which the Court may judge,) yet in Evidence, so great and exact Certainty is not requisite; for the Jury may found their Verdict, (if the Matter be ambiguous) upon what is most probable, and by the same Reason that which is most probable, is good Evidence, and therefore it shall be intended, that *H. C.* had no other Issue Male, because the the other Party did not shew that he had.

The Precedent of a Demurrer upon Evidence in *Reniger and Fogassa's Case*, in *Plowd. Com. f. 1*. In an Information upon a Seizure of Woad imported, the Customs not being paid, nor any Agreement made with the Collector in the Exchequer, where the Issue was, whether the Defendant made an Agreement with the Collector of the Subsidies for the Woad, according to the Act, &c. or not.

‘ Ideo fiat inde inquis. ac pro eo quod idem
 ‘ A. Fogassa est Alien' natus videl't apud Ci-
 ‘ vitatem Portus Portuagalie in Portugalia sub
 ‘ obedientia præd' Portuagalie Regis petit me-
 ‘ dietatem linguæ suæ, &c. A. B. E. M. R. S.
 ‘ &c. qui ad veritatem de præmissis dicend'
 ‘ electi triati & jurati dictus A. F. in manu-
 ‘ tentione exitus præd' superius ad patr' juncti
 ‘ & ad proband' exit' ill' pro parte ipsius A.
 ‘ fore verum produxit præd' Tho. Wells Col-
 ‘ lect' Custom' & Subsid' Domini Regis in por-
 ‘ tu villæ Southampton ac J. S. adtunc & ad-
 ‘ huc Clericum sive servient' ipsius Tho. Wells
 ‘ in dicto Offic' Collect' præd' nec non quen-
 ‘ dam J. D. Yeoman ad testificand' præmissa
 ‘ in placito ipsius A. spec' fore vera. Qui qui-
 ‘ dem Tho. Wells examinatus sup' sacram'
 ‘ suum coram Baronibus hic præstitum in præ-
 ‘ missis dicit quod, &c. [*Here recite the Evi-*
 ‘ *dence.*]

‘ Et præd' Attorn' Dom' Regis pro eodem
 ‘ Dom' Rege dic' quod evidentia præd' supe-
 ‘ rius dat' minus sufficien' in legē existunt ad
 ‘ manutenend' seu proband' exit' pro parte ip-
 ‘ sius A. F. superius ad patriam junct' unde
 ‘ ob insufficient' earundem evident' ac ex quo
 ‘ per evidencias illas non deducitur forisfactura
 bonorum

‘ bonorum præd’ in informatione præd’ spec’
 ‘ idem Attorn’ Dom’ Regis pro ipso Dom’ Re-
 ‘ ge petit Judicium ac quod eadem bona re-
 ‘ maneant Domino Regi forisfacta juxta for-
 ‘ mam Statuti præd’ Et præd’ A. F. dic’ quod
 ‘ evidentix præd’ superius ex parte ipsius A. F.
 ‘ dat’ sufficien’ in lege existunt tam ad manu-
 ‘ tenend’ & proband’ exit’ præd’ pro parte
 ‘ dicti A. F. superius ad patriam junct’ quam
 ‘ ad excludend’ Domin’ Regem de aliqua fo-
 ‘ risfactura bonor’ præd’ habend’ Ad quas
 ‘ præd’ Attorn’ Domini Regis pro ipso Dom’
 ‘ Rege minus sufficienter respondit nec ali-
 ‘ quod pro ipso Rege allegavit unde idem A.
 ‘ pet’ Judicium ac quod præd’ bona in dicta
 ‘ informatione spec’ ei reliberentur quodque
 ‘ ipse quoad præmissa ab hac Curia dimittatur.
 ‘ Ideo ad Judicium.

*Note, In this Case, the Agreement accord-
 ing to the Statute, was put in Issue generally,
 and yet the special Agreement maintained the
 Issue.*

*And wheresoever the Evidence doth not warrant, Regula,
 prove and maintain the very same Thing that is in
 Issue, that Evidence is defective, and may be de-
 murred upon.*

Upon *non est factum* to a Bond dated at York: *Non est factum.*
 it was said in this Case, That to prove the
 Bond made in another Place, doth not prove
 the Bond nor warrant the Issue, because the
 Delivery is intended to be where the Date is;
 but the Witnesses cannot prove the contrary,
 and so the Issue is not proved. But surely
 if this be found, the Plaintiff shall have Judg-
 ment as well as upon a Bond delivered before
 the Date, 31 H. 6. Pl. 7. Roll. 677. But In-
 fancy, or made by Dures, cannot be given in
 Evi-

Evidence upon *non est factum*, Lib. 5. *Whelpdale's Case*, 119. because thereby the Bond is not void but only voidable: Otherwise of the Bond of a Feme Covert, or Monk, for there the Bond is void, and so *non est factum*; and so of a Bond made to a Feme Covert, and the Husband disagree to it, or by Husband and Feme, *non est factum* of the Wife.

Release.

In an Assize, if the Tenant plead *nul tort*, *nul disseisin*, he cannot give in Evidence a Release after the Disseisin; but a Release before the Disseisin he may, for then there is no Disseisin upon the Matter.

Warranty.

In a Writ of Right, if the Tenant join the Mise upon the meer Right, he cannot give in Evidence a collateral Warranty, for he hath not any Right by it, and therefore it ought to have been pleaded, 1 *Inst.* 283.

Regula.

Regularly, whatsoever is done by force of a Warrant or Authority, ought to be pleaded.

But Note, In all Cases where one cannot have Advantage of the special Matter, by way of Plea, there he may have Advantage of it in Evidence; as for Example, the Rule of Law is, That one cannot justify the Death or killing of a Man; and therefore if one kill another in his own Defence, he cannot plead this specially; but he may give this in Evidence: And so in Defence of his House against Thieves and Robbers, &c.

Sewers.

By the Statute 23 *H. 8. cap. 5.* any Thing done by the Authority of the Commission of Sewers, may be given in Evidence upon the general Issue.

Regula.

*After taking the general Issue, the Defendant cannot give in Evidence any Thing that goes in discharge of the Action; as in Debt upon *nil debet*, he cannot give in Evidence a Release, nor a Grant*

a Grant to cut Trees, to repair upon *nul wast fait*, nor making of a Ditch to amend the Meadow: But that he only lopped the Trees, he may, if Waste be assigned in *succidendo Arbores*, &c. Neither if a Statute was made, **Statute.** That all Tenants for Life should be punishable of Waste, could he give in Evidence this Statute, 28 H. 8. Dyer 28. for the Discharge ought to be pleaded, because it admits a Cause of Action without it.

In an Issue upon Villenage regardant to Villenage. a Manor, a Villain in gross is no Evidence, Dyer 48.

In Waste by the Grantee of a Reversion, **Attornment.** by Mountague and Fitz. the Lessee may plead that he in Reversion *ne granta pas per le fait*, and give in Evidence, that he never attorned, or he may traverse the Attornment at his Election, Dyer 31.

In Rescous by the Lord, upon Not guilty, **Rescous.** the Defendant shall not give in Evidence, That he doth not hold; by *Vavasour* and *Bryan*; and so if he said *nothing is behind* in Avowry, **Avowry.** he shall not give in Evidence that he doth hold of him, T. 9 H. 7. 3.

In Assize, Feoffment pleaded, the Plaintiff **Feoffment** said he did not *infeoff modo & forma* upon the Deed and Letter of Attorney to infeoff upon Condition found, if the Attorney made it without Condition, this well proves the Issue for the Plaintiff, 13 E. 4. 4.

If one plead a Feoffment *Jointment* with his Companion, or of a Feme Covert, the other may say, *ne enseoffa pas*, and give the Matter in Evidence, and the Court shall instruct the Jury of the Law, 18 E. 4. 29.

Evi-

Regula.

Evidence which is contrary to that in Issue, or which is not agreeable to the Matter in Issue, is not good.

As appears by several Cases which you may find in the Chapter of Evidence. As upon the Issue, *nothing passes by the Deed*; you cannot give in Evidence, that it is not your Deed, for this is contrary to the Issue, and to that which is acknowledged in the Plea by Implication, § H. 4. f. 2.

And so upon Not guilty in Assault and Battery, and Evidence that it was done in his own Defence, is not good.

And so in Debt upon a Bail-Bond, you must plead, That there is not the Name of Sheriff in it, & *issint nient son fait*, and cannot give in Evidence upon *non est factum*, for it is contrariant, § E. 4. 5.

So upon Issue of Common appendant, Common *pur cause de vicinage* is not agreeable to the Matter in Issue, and therefore cannot be given in Evidence, 13 H. 7. 13.

Regula.

Where the Evidence proves the Effect and Substance of the Issue, it is good.

As to prove a Grant or Lease pleaded *Simplement*, a Grant or Lease upon Condition, and the Condition executed, is good; for this proves the Effect and Substance of the Issue, 14 H. 8. 20. So a Promise to the Wife, and the Husband's Agreement proves a Promise to the Husband, and this you may see in many Cases, in the Chapter of Evidence.

Other Cases
of Evidence.

Maintenance.

Justifiable Maintenance cannot be given in Evidence upon the general Issue, but must be pleaded. The Master may justify for his Servant. Any Man for his Kindred, &c. or to give Money to the Poor, &c. But that he was of his Counsel may be given in Evidence

upon the general Issue, for to give Counsel, is not Maintenance, 22. H. 6. 35. 28 H. 8. 6.

In an Issue upon a Prescription traversed, A Witness the Plaintiff gave in Evidence a Deed, bearing Date after the Time of Limitation, *scilicet* after the Time of R. 1. And the Defendant would have demurred in Law upon it, and well he might, *per Cur.* Whereupon the Plaintiff would not give this in Evidence, but gave other Evidence 34 H. 6. 37. See Chapter Evidence, where a Grant shall be taken as a Confirmation of a Prescription. *may prove the Contents of a Deed or Will, Vaughn's Rep. 77.*

Note, The Opinion, 12 H. 4. 21. That a Ancient Deed made before the Time of Memory, may be given in Evidence, although it cannot be pleaded. *Deeds.*

Vide Repl. in Fitz. 34. Repl. of a Sow and Pigs, the Defendant justified for the Sow; and to the Pigs, pleaded he did not take them; the Jury found, that the Sow was with Pig, when she was taken, and after cast her Pigs in the Custody of the Defendant, and the Plaintiff recovered Damages: For says Bro. Abridg. tit. General Issue, 88. This is a special Taking in Law. Sow pigged, being taken in Distress.

It sufficeth to prove the Substance, without any precise Regard to the Circumstance. As if an Indictment be, That with a Dagger the Offender gave another a mortal Wound, &c. And in Evidence it is proved to be done with a Sword, Rapier, Club, Bill, or any other Weapon, the Offender upon this Evidence ought to be found guilty; for the mortal Wound is the Substance, and the Manner of the Weapon is but the Circumstance; yet some Weapon ought to be mentioned in the Indictment. And so if A. B. and C. be indicted for killing of J. S. and that A. struck, and *Regula. Substance. Circumstance. Indictment.*

and the other were Abettors; to prove that B. struck, is sufficient, &c.

Manſlaughter upon an Indictment muſt be found, if proved, becauſe the killing is Subſtance, upon which Judgment ſhall be given.

Indictments for Murder of Miniſters of Juſtice, in Execution of their Office, may be general, viz. That the Priſoners *felonice, voluntarie & ex malitia ſua præcogitata, &c. percuſſerunt, &c.* without alledging the ſpecial Matter which may be given in Evidence, for the Law implies Malice prepended. So if a Thief in robbing, kills a Man that reſiſts him, or a Man is killed without any Provocation, or without Malice prepended that can be actually proved, the Law adjudges this Murder, and implies the Malice; and in theſe Caſes, the Offenders may be indicted generally, That they killed of Malice prepended; for the Malice implied by Law, given in Evidence, is ſufficient to maintain the general Indictment, *Lib. 9. 67. Mackalley's Caſe.*

So of an Indictment as Accessary to two, to prove Accessary to one, is ſufficient, *Lib. 9. 119.*

In *Cromwel's Caſe*, *Lib. 4. 12.* Although it was objected, That in an Action of Slander, if the Defendant will juſtify, he muſt juſtify the ſame Words, and in the ſame Senſe, as is laid in the *Nar'*, or elſe he muſt plead Not guilty, and give the ſpecial Matter, that is the Variance in Evidence. Yet the Court held, That the Defendant ſhould not be put to the general Iſſue, but might juſtify, although he varied from the Plaintiff in the Senſe and Quality of the Words; and might ſet forth the coherent Words, As for calling the Plaintiff Murderer, the Defendant may
1
ſhew

shew that they were speaking of Hares, and the Words were spoken in Reference to killing of Hares.

Upon the Issue, if the Lord of the Manor granted the Lands, *per copiam retulorum Curie manerii præd' secundum consuetudinem manerii præd'* To prove that there were customary Lands in the Manor, and that the Lord of late granted the Land, &c. *per copiam Rotulor. Curie*, where it was never granted by Copy before, is no good Evidence to find the Custom, or that the Lands, &c. were grantable or demiseable by Custom, *Leon 55. Kemp and Carter's Case.*

Copyhold. In Pilkington's Case, Style 450. Rolle said, if Copies of Court-Roll be shewed to prove a Customary Estate, the Enjoyment of such Estates must also be proved, otherwise the Proof is not good.

Forger of a Deed, in which is contained a Demise of the Site of the Manor of R. and *terras dominicales*, &c. A Deed of the Site and all the Demesnes of the said Manor, *exceptis duabus clausuris*, &c. is good Evidence; for it is not necessary to construe *terras dominicales*, &c. *omnes terras dominicales*, &c. for Lands not accepted are *terre dominicales*, and so the Court is satisfied by that Evidence, *Leon 139. Atkin's and Hale's Case.*

Forger. Totum & pars.

In a Replevin, the Taking was supposed in R. The Defendant said, That the Place where is forty Acres, parcel of the Mannor of R. which is his Freehold, and avowed for Damage-feasant; the Plaintiff said, that the Place where is Parcel of the Manor of R. in R. and conveyed Title to himself in that; *Absque hoc* that the Mannor of R. *unde*, was the Freehold of the Defendant. It was the Opinion of the Justices, that the Plaintiff is estopped to give Evidence that the Defendant had not any Manor of R. for the Words *absque hoc* and *unde* imply he had such a Manor, but he ought to have taken it by Protestation, that

No Evidence to be given against what is admitted upon the Record.

that the Defendant had no such Manor of R. in R. *absque hoc* that the forty Acres was the Freehold of the Defendant, *Dyer* 183.

Estoppel.

Where a Man is estopped in Pleading, to speak against his own Deed, yet he shall not in Evidence; as in *Isibam's Case* against *Morris*, *Cro. 4 Car.* 109. Upon Evidence at Bar, it was held by all the Justices of the Common Pleas, That where one makes a Lease for Years of Land by Indenture, and hath nothing in the Land, and afterwards purchaseth the Land and aliens it; although it be a good Lease for Years by Estoppel against him and his Alienee, by way of Pleading, and shall bind them, yet it shall not bind the Jury, but they may find the Truth; and if they find the Truth, the Court shall adjudge it to be a void Lease, *Vide tamen Rawlin's Case, Lib. 4.* 53. *Sutton and Dicken's Case, Leon* 1 Part, f. 206. 1 *Inst.* 47. 227. *Edwards* against *Omelballum*, *March* 64. *James and Landon's Case, Cro. 27. Eliz.* f. 36. *Leon*, 3 Part, 210. *Bulst.* 2 Part, 41.

Demurrer.

Note, That if a Demurrer be made upon the Evidence, the Evidence ought to be entered *verbatim*, *Keilway* 77. Where in Account, against one generally as Bailiff, the Evidence that charged him specially by Reason of his Tenure to collect, &c. was upon Demurrer held not good.

Surplusage.

Matter of Surplusage shewed in Evidence shall not hurt, *Keilway* 166.

Will.

Issue was upon a Devise to *A. Harding* and her Heirs, *modo & forma*, and the Will given in Evidence was, *A. H. shall have all my Inheritance, if the Law will allow it*, and held sufficient to maintain the Issue, *Hob.* 2. So upon *ne unques receiver per maines J. S. a Delivery* from

from *J. D.* by the Appointment of *J. S.* to Account. the Plaintiff's Use, is good Evidence, *Hob.* 36.

Issue whether *A.* was taken by a *Capias ad Arrest* *sat.* at the Suit of *B.* and Evidence of a Taking at the Suit of *C.* and then a Delivery of a *Capias ad sat.* at the Suit of *B.* to the Sheriff, is good, *Hob.* 55. But a Taking upon a *Capias utlagat.* or *capias pro fine*, with a Prayer of the Plaintiff, that he may remain for his Satisfaction, is not, *Ibid.*

In a *Consimili casu*, where the Demandant *Consimili casu.* counts of an Alienation in Fee, yet the De- Substance. fendant shall make his Traverse to the Alienation *modo & forma*; and then the Demandant shall maintain the Issue by an Alienation in Fee, or in Tail, or for Life, for they are all alike material, *Hob.* 105.

In an Affize, the Defendant pleaded the Warranty. Deed of the Brother of the Plaintiff, with Warranty, a Deed of the Father with Warranty will not maintain the Defendant's Issue, *Hob.* 55.

In an Action on the Case, for digging a Demurrer Hole in the Highway, into which his Gelding upon Evidence fell, &c. Upon Not guilty, this Evidence given, That the Plaintiff's Servant was driving the Plaintiff's Gelding in the Way, and that by Reason of the Hole he fell, &c. Upon which it was demurred, because it was not proved that there was such a Highway, or who digged the Hole. *Rolle* Chief Justice, That Evidence is no more than a special Ver- *Action sur dict, and it ought to find the Way and the Case.* Hole digged, and all the Matter conducing to the Issue, and therefore it is not good as it is, and a *Venire de novo* was awarded, *Style* 335.

Demurrer
upon Evi-
dence.

Record.

Deed.

In Trover and Conversion, there was a Demurrer joined upon the Evidence, and thereupon the Court directed the Jury to find Damages for the Plaintiff, if upon the Argument of the Demurrer, the Law should be adjudged for him, and then the Parties desired the Jury might be discharged, and referred the Matter to the Judges, to determine the Law upon the Evidence. In this Case *Rolle* Justice, took this Difference: If a Record be pleaded, it must be *sub pede sigilli*, or else the Judges cannot judge of it; but it may be given in Evidence, and the Jury may find it, though it be not *sub pede sigilli*. And the Court advised the Parties for their own Expedition to let a *Venire facias de novo* be issued out, and to waive the Demurrer upon the Evidence, because it was not good, nor could not bring the Matter in Question before them, that they might determine it; for one Party saith there is a Writ, and the other saith there is not a Writ, which is bare Matter of Fact for the Jury to determine, and not for the Court; and the Demurrer ought to have been, whether the Writ be good or bad, and should have admitted that there was a Writ *tiel quel*; and then had the whole Matter come legally before the Court, to wit, Whether the Evidence given to the Jury be sufficient for them to find a Verdict for the Plaintiff, upon the Issue joined or not? For the Matter of Fact ought to be agreed in a Demurrer to an Evidence, otherwise the Court cannot proceed upon the Demurrer. And he said, If a Deed be pleaded, the Party must shew it in Court; but in Evidence, 'tis not absolutely necessary to shew it, if it can otherwise be proved to the Jury, and so it is of

of a Record; and concluded, that the De-Record.
murrer was not good, and that there ought
to be a *Venire facias de novo* to try the Matter
again. *Bacon* Justice said, there ought to be
a *Venire facias de novo*, but that Judgment
ought to be given against one Party, to wit,
the Defendant, for ill joining in the Demur-
rer, to the Intent the Party that is not in
Fault may be dismissed; and the Parties here
have waved the *Trial per Pais*, by joining in
the Demurrer. But *Rolle* answered, That no
Judgment at all could be given, for both Par-
ties be in Fault, one by tendring the Demurrer,
and the other by joining in it; and the De-
fendant might have chosen whether he would
have joined or not, but might have prayed
the Judgment of the Court, whether he
ought to join? The Court advised to search
Precedents for a *Venire facias de novo* after a
Demurrer upon an Evidence, and if there be
any, they hold that the same Jury ought to
come again, and not another. *Rolle* said, if a
special Verdict be found insufficient, a new
Venire facias ought to issue, and he saw no
Difference, between that and this Case, *Wright*
and *Pindar's Case*, *Style* 22 and 34.

Where the Issue is not perfect, no Evidence Imperfect
can be applied, neither can the Justices of Issue.

Nisi prius proceed to the Trial of such an Is-
sue. As whether the Money be paid after the
Date of the Obligation, and the Date was
left out and did not appear in the Record,
Brown. 2, 47.

Note, If there be a Demurrer, yet there *Pleas puis*
may be a Plea *puis darrein Continuance*; and *darrein conti-*
if the Plaintiff take Issue, or demur to this *nuzances*
Plea, yet the Court must also consider of the
first Demurrer; for if upon that standing

confessed by the Demurrer, the Plaintiff could not have his Action, the Court cannot give Judgment for him, howsoever the latter Issue or Demurrer pass. But otherwise if the first had been an Issue; for then nothing were confessed to his Prejudice, and then that had been utterly relinquished by a second Issue, or Demurrer, *Hob.* 18. with a Query, &c. When this Plea is pleaded, the Justices of *Nisi prius* cannot proceed to take the Inquest, neither can the Plaintiff reply there, but in *Bank*, *Bulstr.* 92, 93.

Of Averments.

Averment.

And in regard what may be averred, may be proved and given in Evidence, 'twill not be impertinent to draw a short Scheme of Averments, with which I will conclude.

Averment
had upon or
against a
Deed.

To alter, qualify, or abridge the Operation of it, if there be any apt Words in the Deed, whereupon to ground it. As a Grant to *A.* the Son of *B.* and he hath two Sons of that Name, of the Manor of *S.* and he hath two Manors of that Name, which Son or Manor was intended may be averred. And so may a Consideration of a Deed that is besides, but not that is against, the express Consideration of the Deed; nor can any Thing against the Words of the Deed either enlarge or restrain it.

Consideration.

Uses.

Nor can a Use against or besides the express Uses in the Deed; but where no Use is expressed, or incertainly expressed, it may; and also to reconcile a Fine, and the Indentures to lead the Uses of the Fine, *Lib.* 2. 75.

But

But when a Deed is utterly incertain, no Averment shall help it. As a Grant to one of the Sons of J. S. to two & *Hæredibus*, &c.

An Estate to a Woman for her Life may be averred to be made for her Jointure, ^{Upon or a-} ^{gainst a Re-} ^{cord.} *Dyer* 146. lib. 4. 4. And that the Thing granted to me by a new Name is all one Thing with that which hath another, or an old Name, *Dyer* 37. 44.

A Thing that is against or besides a Record, or any Thing that is within it shall not be averred; therefore the Date of a Recognizance expressed to be taken at *Dale* cannot be averred to be taken at *Sale*. But such an Averment as may stand with the Record may be admitted. As that the Fine was before the Inrollment (being both in one Term,) the Uses of a Fine or Common Recovery may be averred; or what, or who was meant, where there are two of a Name, &c. *Lib.* 8. 155. *A Fine taken by R. M. Esq; and returned by R. M. Militem upon the Ded. p. the Record not to be averred against in Error. Telverton 33. Cro 2 Part, 11.* The Heir in Tail cannot aver against a Fine levied by his Ancestors, That *partes finis nihil habuerunt*, *Lib.* 3. 84, 85. *Leon* 75, 76, &c. But when Tenant in Tail accepts of a Fine, and grants and renders the Land by the same Fine, which is executory; there, if no Execution be sued in the Life of Tenant in Tail, his Issue may aver Continuance of Possession, &c. in his Father; for this stands with the Fine, and the Acceptance of the Fine alters not the Estate.

If a Man and his Wife sell her Land for Money, and after levy a Fine to the Vendee, and his Heirs, it may be averred it was for Money, and so carry the Use to the Vendee, without any Declaration of Use, which otherwise would result to the Woman and her Heirs: And so other Uses may be proved,

than what are in an Indenture of Uses subsequent to the Conveyance, &c. *Lib. 9. 8. 526.*

Tenant in Tail with Remainder in Tail to A. Reversion in Fee to himself, bargains and sells Land, &c. and levies a Fine to him with Proclamation, with general Warranty. The Conusee infeoffs A.

Resolved, The Bargainee had an Estate determinable upon the Death of the Tenant in Tail, (and also the Reversion in Fee, which the Bargainor had) and his Wife shall be endowed, but this determines upon the Death of the Tenant in Tail.

Resolved, The Fine doth not discontinue the Remainder, for this doth not pass any Estate, but this Estate of the Bargainee is durable, &c. so that it shall not determine, until the Tenant in Tail die without Issue; and the Conclusion may be confessed and avoided.

Resolved, That Warranty doth not bar the Remainder, for this was annexed to the Fee determinable, &c. and to the Reversion in Fee, and doth not extend to the Remainder, for the Conusee cannot enlarge, &c. 'Tis a Maxim, that a Warranty bars no Freehold, which is in *esse*, Possession or Remainder, &c. and not displaced before or at the Time of the Warranty, although it be divested before the Descent.

Resolved, A Warranty cannot enlarge the Estate.

Resolved, The Feoffment of the Conusee was not a Discontinuance of the Remainder, because he was not Tenant in Tail; so of the Grantee of *totum statum suum*, &c.

Resolved, A collateral Warranty may be given in Evidence, and found by the Jury.

The

The Chief Justice held, That by the Feoffment of the Conuſee, the Remainder was not displaced nor put to a Right, for his Fee-ſimple, and his Fee determinate paſs; and the Feoffment which in it ſelf is not tortious, cannot be tortious to another. Otherwiſe it is when Tenant for Life, or Remainder in Tail, &c. makes a Feoffment, for the Feoffment it ſelf is tortious.

Note, There are ſome Titles, to which a Warranty doth not extend, as in the Caſe of an Exchange, Condition upon a Mortmain, Conſent to a Ravisher, &c. for in theſe Caſes no Action lies, in which Voucher or Rebutter may be, neither ſhall a Deſcent take away Entry in theſe Caſes, and cannot be displaced out of their original Liſſence. Collateral Warranty ſhall bar Dower, and yet an Action is given for this. But a Fine, &c. and five Years bar theſe Titles and Dower alſo, if an Action be not brought in Time, *Seymour's Caſe, Lib. 10. 96.*

Buckler and Harvey's Caſe, Lib. 2. 55.

Tenant for Life leases for four Years, and afterwards grants the Tenements, *Hab.* from P. for Life, after P. the Leſſee attorns, then the Grantee enters and leases at Will, to which Tenant at Will the Tenant for Life levies a Fine *Come ceo, &c.* Rem. in Fee enters.

Resolved, The Grant was void, for an Eſtate of Freehold cannot commence *in futuro*, and the Grant being void at the Commencement, the Attornment afterwards cannot make it paſs; and that the Grantee was a Diſſeiſor. But if the Grant had been good at the Commencement, and was only to have its Perfection by a ſubſequent Act, as by Livery

Upon a Charter of Feeoffment, &c. and the Grantee enter before the Perfection, he is not a Disseisor, but a Tenant at Will.

Resolved also, If the Fine had been levied to the Disseisor himself *Come ceo*, &c. he which had the Right of Remainder, may enter for the Forfeiture; for it was agreed, that the Right of a particular Estate may be forfeited, and Entry given to him who had but a Right. As if Lessee for Years be ousted, or Tenant for Life disseised, and the Lessee for Years brings an Assize, or the Lessee for Life a Writ of Right, &c. 'tis a Forfeiture.

Resolved also, That the Fine being levied to the Tenant at Will, it is a Forfeiture, and he which had Right of Remainder may enter, and the Tenants for Life and at Will also, shall be estopped to say *quod partes finis nihil hab* &c. and of such Estoppels which are by Matter of Record, and trench to the Dishe-
rison of them in Reversion, &c. they shall take Advantage although they are Strangers to the Record, for they are Privies in Estate.

Resolved also, If the Disseisee levy a Fine to an Estranger, the Disseisor shall retain for ever; for the Disseisee against his own Fine cannot claim the Land, and the Conusee cannot enter, for the Right of the Conusor cannot be transferred to him; but by the Fine the Right is extinct, whereof the Disseisor shall have Advantage. But in *Croke*, 1 Part, 482. 13 *Car.* it was moved, If the Disseisee, not knowing of the Disseisin, levied a Fine to a Stranger, whether that should bar his Right, and move to the Benefit of the Disseisor, according to *Buckler's Case*; and said, if admitted, would be of very mischievous Consequence, and by two Judges held, That
it

it should not enure to the Benefit of the Disfeisor, but to the Use of the Conusor himself; for otherwise a Disfeisin being secret, may be the Cause of Disseisin of any one who intends to levy a Fine for his own Benefit, for Assurance of his Lands upon his Wife and Children, or otherwise, 1 *Inst.*

277.

Not against such Certificates as are a definitive Trial of the Thing certified, as the Bishop's Certificate of Excommunication, Bastardy, lawful Marriage, &c. So Certificates of the Marshal of the Host, which is a Trial; but against Certificates only of Information it may be: As against Certificates upon Commission out of any Court, or of the Commissioners that affirm a Man a Bankrupt, which are not triable in a Course of Law, but Informations, *Lib. 7. 14. Lib. 8.*

121.

So of a Return, if it is a definitive Trial Upon a Return of the Thing returned, no Averment lieth against it. As the Return of a Sheriff upon some Writs, as a Writ of Partition, *Elegit* and of *Hab. Corp.* from a Mayor, &c. But if the Return is not definite, as upon a Return, &c. an Averment doth lie, and upon this you may go to Trial: So if there be a Return to indanger a Man's Life, or his Inheritance, an Averment may be had against it, *Dyer* 348. 117. So it lyeth against the Returns of Bailiffs of Franchises, so that the Lords be not prejudiced in their Franchises thereby, *Geldsb.* 129, 139. *pl. 23.*

In Action for a false Return, an Averment doth lie against the Sheriff's Return, *Winch* 100. and so it doth in any other Action, than in that the Return was made.

Any

Upon or against a Will or Administration, it lieth altho' they be under Seal of Court.

Any Averment may be upon a Will or any Part of it that may help to expound it, and of such a Thing that may stand with the Will, and may be collected out of the Words. As which Son he meant, &c. *Lib. 8. 31, 41.* But no Averment against or besides that which is expressed in the Will, or which cannot be gathered to be the Mind from the Words, nor of any Thing that doth not cohere with the Will; especially if it be about Lands, as in the Lord Cheyney's Case, *Lib. 5. 68.* A Devise to *A.* and the Heirs of his Body, the Remainder to *B.* and the Heirs Male of his Body, on Condition *that he or they or any of them should not alien, &c.* no Averment shall be taken to prove by Witnesses or other Evidence, that the Devisor intended to include *A.* within this Condition by the Words *he or they*; for the Construction of Wills ought to be collected out of the Words of the Will in Writing, and not by any Averment or Proof out of it.

Against Court Rolls, or upon them.

It lies against the Rolls or Records of County-Courts, Hundred-Courts, Courts-Baron. As that there is no such Record, or it is not as it is certified, *34 H. 6. 42. 9 E. 4. 4.*

Against common Presumption or Reason.

No Averment or Proof is to be admitted against common Presumption, as that there was more Rent behind, when the Acquittance of the last Rent was made, *1 Inst. 373.* Nor against common Reason, as that Land doth belong to Land, or to a Messuage, *Pl. 170. Lib. 4. 37.*

Upon an Award.

If the Matter contained in an Award, and the Matter in the Submission do not agree, it will hardly be supplied by an Averment, *Dyer 242. 52.*

If

If the Defeazance of a Recognizance be Date. dated before the Recognizance, it may be averred to be delivered at or before the Time of the Recognizance entred into, *Perkin's Case* 147.

Things apparent or necessarily intendable by Law, need not be averred: *Manifesta non probatione indigent: Quod constat clare, non debet verificari. Lib. 11. 25. Plo. 8.*

Chief Justice *Anderson* held, *Godbolt* 131. Devise. That if one devise Lands to the Heirs of *J. S.* and the Clerk writes it to *J. S.* and his Heirs, that the same may be holpen by Averment, because the Intent of the Devisor is written, and more, and it shall be naught for that which was against his Will, and good for the Residue. But if a Devise be to *J. S.* and his Heirs, and it is written but to the Heirs of *J. S.* there an Averment shall not make it good to *J. S.* because it is not in Writing, which the Law requires; and so an Averment to take away any Surplusage is good, but not to increase that which is defective in the Will of the Testator. But with Submission, if the Law should admit of such Averments, it would be as mischievous one Way as the other, and no Man could know by the Words of the Will, what Construction to make, nor what Advice to give, but this shall be controuled by collateral Averments out of the Will, and instead of proving the Testator's Will, it would be the destroying of it.

If the Partition be by Writ, although it be unequal, yet it shall not be avoided by Averment, but shall bind the Feme Coverts. And such Averment against the Return of the Sheriff shall not be good, 1 *Inst.* 171. Partition.

Ava-

Consideration.

A valuable Consideration in a Bargain and Sale not expressed, may be averred, 2 *Inst.* 672.

A Consideration which consists with the Deed, and not repugnant, may be averred; as in a Bargain and Sale, if a particular Consideration be expressed, and the general Clause, of *other good Causes and Considerations*, or without that general Clause, yet other Considerations may be shewed: So if the particular Consideration be Love and Affection, yet Payment of Money may be shewed: So a precedent Intent of Uses and to levy a Fine, may be shewed to guide the Use of the Fine, *Roll. tit. Uses*, 790.

Uses.

As if I covenant by Deed to purchase Land, and then to levy a Fine, or make a Feoffment thereof to the Use of another, and afterwards purchase and levy a Fine, or make a Feoffment, this Use shall rise; for the Deed is an Evidence of the precedent Intent, and the Uses of a Fine or Feoffment may be directed by the precedent Intent, and yet such Intent is countermandable. But a Covenant to purchase and stand seized of Lands to Uses, shall not raise the Use after the Purchase, because the Use is to rise by the Deed, and at the Time when the Deed was made, there was no Estate in the Land, *ibid.*

So if one Joint-tenant covenant to stand seized of his Companion's Part, if he survive, yet no Use shall rise if he did survive, because at the Time of the Covenant, he could not grant nor charge the Land, *ibid.*

Fine sur Grant & Render.

'Tis true that a *Fine sur Grant & Render*, unless it be in special Cases, cannot be averred by Parol to be to any other Use or Intent than what is expressed in the Fine, Feoffment,

ment, or other Conveyance : But there is a Diversity betwixt a Use and Consideration ; for when a Fine, Feoffment, or other Conveyance import an exprefs Consideration, a Man may aver, by Word, another Consideration, which may stand with the Consideration expreffed ; but the Parties cannot by Parol aver any other Use than is contained in the fame Conveyance. Also no Averment shall be againſt the Consideration expreffed : But yet in ſome Caſes a Fine *ſur Grant & Render* may be ruled and directed in Part by Averment *per parol* : And this is when the original Bargain and Contract betwixt the Parties, is by Indenture or other Deed ; as where it is agreed by Indenture, that a Fine ſhall be levied of certain Lands, by the Name of a certain Number of Acres, to divers Perſons, and that they ſhall grant and render the Land again in Fee-ſimple, which ſhall be to certain Uſes, the Fine is levied of the Land ; but there is ſome Variance betwixt the Number of Acres comprized in the Fine ; or the Fine is levied to one of the Parties only, who grants and renders the Land, ſo that there is a Variance betwixt the Covenant and the Fine, either in the Number, Time or Perſon, &c. yet this Fine ſhall be averred to be to the Uſes in the Indentures. For the Intent of the Parties, and the Subſtance and Effect of their original Bargain and Agreement, is chiefly to be regarded in all Conveyances ; and therefore the Law allows an Averment by Parol, to reconcile the Fine and Indentures, although this Sort of Fine imports a Consideration in it ſelf, and regularly by a naked Averment by Parol, cannot be
averred

averred to be to any other Use or Intent, than is comprised in the Fine it self; but by Deed it may be, *Lib. 2. 77.*

And although a Fine be of so high a Nature, that it will not permit naked Averments against the Purport and Consuance of the Fine; yet when the Law requires one of Necessity, and for Conformity to join with another in a Fine, the Law permits to shew the Verity of the Matter, to avoid Prejudice and Confusion. As where Baron and Feme an Infant levy a Fine, which is reversed for the Nonage of the Wife, the Baron and Feme shall have Restitution presently, and the Conusee shall not detain this during the Coverture; for all the Estate passes from the Feme, and the Baron joins for Necessity and Conformity; and therefore the Law permits that the Verity of this shall be shewed, and that the whole Estate shall be restored to the Wife, during the Life of the Husband, *Worsely and his Wife against Charnock, 30 and 31 Eliz. Lib. 2. 77.*

What may be averred *contra & præter* Records, Fines, Recoveries, Deeds, Wills, &c. is very requisite for a good Practiser to be ready in, and therefore I have here given this Taste, referring him to the Books at large, where he may see what Averments he in Remainder, the Heir in Tail, the Wife, her Heirs, Estrangers, Privies, Parties, &c. may have to Fines, Recoveries, &c. *Lib. 1. 76. Lib. 2. 77. Lib. 4. 71. Lib. 9. 140, 141. Lib. 2. 55. Lib. 2. 88. Lib. 10. 50, 96. Lib. 3. 51, 88. Lib. 4. 74, &c.*

The Knowledge of Evidence is so beneficial and necessary, for all Practisers in the Law, that none can know too much, be too well versed, or too often conversant in it. Therefore to compleat this Treatise, especially in this particular I have drained the Law Books of all, or the most principal Cases relating to it; and have added some Observations very fit for the Unlearned to know, and I hope not fit for the Learned to reject.

Note, The Chapter of Verdicts gives much Light to know what Evidence is good, and what not.

C H A P. XVI.

*Brief Observations relating to Trials in capital Cases.**Accessary.*

1. **I**F the Principal be acquitted, or convict only of Manslaughter, or *se Defendendo*, or before Attainder hath his Clergy or Pardon, or die, the Accessary shall not be arraigned. So if the Principal stand mute, *Hale P. C. 221.*

2. If the Principal appears not, the Accessary shall not be tried, unless he will, *Ibid. 222.*

3. Where a new Felony is made by Statute, it seems that there is no Accessary, unless specially enacted, *Id. 223. Quære*, for *Co. 3 Inst. 72.* is otherwise.

4. A Man being acquitted as Principal, cannot be arraigned as Accessary; but if acquitted as Accessary, he may be arraigned as Principal, *Id. 224.*

5. Where there are two Principals and one Accessary, if one of the Principals be found Not guilty, the Accessary is discharged, *Co. 2 Inst. 183.*

Accessary to be tried when the Principal is pardoned or admitted to his Clergy.

By 1 *Annæ*, cap. 9. it was enacted, That if the Principal be convict of Felony, stand Mute, or challenge peremptorily above twenty Jurors, the Accessary may be proceeded against, as if such principal Felon had been attainted, notwithstanding such principal Felon,

lon, be admitted to his Clergy, pardoned or otherwise delivered before Attainder.

Such Accessary being convicted, or if he stands Mute, or challenge as aforesaid, shall suffer as if the Principal had been attainted. And suffer as if the Principal was attainted.

By 5 *Annæ*, cap. 31. it is enacted, That if any Person shall receive or buy knowingly any stolen Goods, or knowingly harbour or conceal Felons, he shall be taken as Accessary to the Felonies, and being convicted, shall suffer Death as a Felon. Receivers of Felons or stolen Goods deemed Accessories.

If the principal Felon cannot be taken, so as to be convicted, yet the Person buying stolen Goods, or receiving a Felon knowingly, may be prosecuted for a Misdemeanour, to be punished by Fine and Imprisonment, or other corporal Punishment, as the Court shall think fit, which shall exempt the Offenders from being punished as Accessary, if the Principal be after convict. Such Accessories may be prosecuted before the Principal is taken.

Vide Attainder 3. Bar 1.

Accusation.

1. By the Statute 37 E. 3. c. 18. Promoters of Suggestions to the King were to incur the Pain which the accused should suffer, in Case the Suggestion hold not; but that Clause was repealed by 38 E. 3. c. 9. and the Penalty changed into Fine and Imprisonment, and Damages to the Party grieved.

Action.

1. Action lies after Trial and Acquittal (of Felony) for unjust and malicious Prosecution. 400 *l.* Damages were recovered in the Common Pleas after Trial in the King's Bench.

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The Case of the five Frenchmen. Vide Lord Hollis's Narrative, p. 42.

Appeal.

1. An Appeal for the Death of her Husband is prosecuted in the Office of Civil Pleas in the King's Bench, and not in the Crown-Office; and the Woman may prosecute by Attorney, made by Warrant under Hand and Seal, acknowledged by the Party in Court, or proved by Witnesses, 2 Jones 210. Warren and Verdon.

2. Principal or Accessary in Murder, being acquitted within a Year and a Day after the Fact, the Justices shall not let them go at large, but either remand them to Prison, or bail them till the Year and Day be up, in which Time the Wife or next Heir of the Party slain (whether the Offender be attaint or acquitted) may prosecute their Appeal, in Case the Benefit of Clergy hath not been allowed. The Appellant must commence the Appeal in proper Person, but may after appoint an Attorney to prosecute it (save only in such Cases where Battel lieth) Stat. 3 H. 7. c. 1. sect. 15. & *infr.*

3. No Man shall be taken or imprisoned upon the Appeal of a Woman for the Death of any other than her Husband, Mag. Chart. c. 34.

Vide *Particeps Criminis* 1.

Arraignment.

1. A Prisoner at the Time of his Arraignment ought not to be in Irons, Hale P. C. 212. *Quere.*

2. After

2. After an Attainder of Felony, the Prisoner may be arraigned of Treason, *Id.* 231.

3. When the Defendant hath pleaded to the Indictment, *Not guilty*, the Clerk on Behalf of the King, or his Attorney-General, by Way of Replication says, *Culprit, i. e. Culpriſt*, which is an Averment of his Guilt, and a taking of Issue thereupon, as much as *paratus eſt verificare quod Culpabilis eſt*; the like as in Civil Actions, & *hoc paratus eſt verificare, priſt*, in French, ſignifying the ſame with *paratus* in Latin; then the Prisoner being demanded how he will be tried, answers, *By God and the Country*, which is the ſame with a Rejoinder and joining Issue in a Civil Action, concluding & *de hoc ponit ſe ſuper Patriam*. So that upon all Arraignments, there is a Formality of pleading obſerved, in Effect the ſame as in Civil Actions.

Vide Trial 6.

Arreſt of Judgment.

1. Four days are regularly given to move in Arreſt of Judgment; but the Court may enlarge the Time if they pleaſe, and accordingly eight Days were given to Oates. Oates's 2d Trial 56, 57.

2. Of old Time the Party convicted, had at leaſt thirty Days to ſhew ſome Matter to arreſt Judgment, which now (ſays Sir Ed. Coke) is gone in *diſuetudinem*; and great Expedition is now made in Pleas of the Crown concerning the Life of Man. *Sed de morte hominis nulla eſt cunctatio longa*, Co. Lit. f. 134. b.

Attainder.

1. Attainder may be falsified by the Party, by Writ of Error ; or by others, as a Purchaser in some Cases, if he purchased before the Attainder, and after the Time of the Felony supposed, *Vid. Hale P. C. 270.*

2. If the Attainder was by such as had no good Commission, the Party himself may falsify, *Id. ib.*

3. Principal is attaint, and then the Accessary ; Principal reverses his Attainder, the Attainder of the Accessary is *ipso facto* avoided, *Id. ib.*

4. Attaint of Treason, and then the Treason is pardoned by Act of Parliament, the Party or Heir shall falsify, *Id. 271.*

Bail.

1. **BY** the Statute of 31 Car. 2. cap. 2. a Writ of *Habeas Corpus* may be granted in Vacation Time by the Lord Chancellor, or any Judge or Baron of the Coif, returnable *immediate*, who are empowered to bail the Prisoner (ifailable) to appear at the King's Bench the next Term, or Assizes, &c. *Sect. 3.* The Prisoner who wilfully neglects two Terms, shall not have the Benefit of a *Habeas Corpus* in the Vacation Time, *Sect. 4.* Persons committed for Felony or Treason, if not (upon their Petition in open Court, the first Week of the Term, or first Day of Sessions, &c.) indicted the next Term or Sessions, &c. shall be bailed, unless it appear by Oath, That the Witnesses for the King cannot be produced so soon ;

soon; and if not indicted the second Term or Sessions, &c. he shall be totally discharged, *Sect. 7.* If the Lord Chancellor, or any of the Judges aforesaid, shall in the Vacation Time, upon View of the Copy of the Commitment, or Oath made that such Copy was denied, deny a Writ of *Habeas Corpus*, he shall forfeit to the Prisoner or Party grieved 500 *l.* *Sect. 10.* Sheriff or Officer neglecting or refusing to obey the Writ, or to deliver a true Copy of the Commitment within six Hours after Demand, shall forfeit to the Prisoner, for the first Offence 100 *l.* for the second Offence 200 *l.* and lose his Office, *Sect. 5.* (unless the Commitment be for Felony or Treason plainly and specially express'd in the Warrant of Commitment.)

2. Persons taken for the Death of a Man, or by Command of the King or his Justices, Persons outlawed, abjured, Provers and such as are taken in the Manner, Prison-breakers, Thieves openly defamed and known, Appellees by Provers, (during the Life of such Provers) House-burners, Counterfeiters of the King's Seal or Coin, excommunicated Persons, and Traitors, are not repleviable (orailable) by common Writ, or without Writ, *Westm. 1. (3 E. 1.) c. 15. Vide Hale P. C. 98. & infr.*

3. Persons guilty of Larceny by Inquests taken before Sheriffs or Bailiffs, or of Petty-Larceny not before detected, or accessory unto any Felony, or only guilty of some Trespass, for which he ought not to lose Life or Member, areailable by good Sureties, *Stat. ubi sup.* To bail those who are notailable, and refuse to bail those who are, is

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punishable by Fine and Imprisonment, *Stat. ubi supra. Hale P. C. 97.*

4. Yet the Court of King's Bench has bail'd one indicted for Murder at the Quarter-Sessions in *Sussex*, the Indictment being removed by *Certiorari* into that Court, after he had been arraigned, and pleaded Not guilty. The Bail were four sufficient Persons, *Corpus pro Corpore, Farrington's Case, Mich. 34 Car. 2. 2 Jones 222.*

5. Justices of Peace cannot bail but where they have Cognizance of the Cause, and therefore if a Man be taken upon a Process of Rebellion out of Chancery, they cannot bail. *Id. 105.*

6. By the Statutes of 3 H. 7. c. 3. and 1 & 2 Ed. & M. c. 13. two Justices of Peace are impowered to bail in Case of Felony, *Hale P. C. 105.*

7. A Bail for a Prisoner cannot be a Witness for him, unless the King's Counsel consent, *Hambden's Trial 32.*

8. By *Stat. 1 W. & M. Sess. 2. c. 2.* it is declared and enacted (*inter alia*) That excessive Bail ought not to be required, nor excessive Fines imposed, nor cruel and unjust Punishments inflicted, and that all Grants and Promises of Fines and Forfeitures of particular Persons before Conviction are illegal and void.

Vide Appeal 2.

Bar.

1. Where a Man is convict upon an Indictment of Manslaughter, and hath had his Clergy, this is a Bar to an Appeal after brought, though it be of Murder, for the Fact is the same, *Hale P. C. 247.*

Baron.

Baron. Peer.

1. A Baron of the Realm being a Witness, sits cover'd after his Evidence is over. So also where he hath been a Parry in a Treason, if he hath his Pardon, *Hamb. Trial* 17.

2. Evidence against the Honour of a Peer of the Realm who gives Evidence for the King, thereby to render him incredible, as to make him an Atheist, &c. not admitted, *Hamb. Trial* 37, 38.

Vid. *Trial* 16. Clergy 4.

Challenge.

1. **P**Risoner may challenge peremptorily in capital Cases, where his Life is concerned, but not in lesser Offences, *Reading's Trial* 8.

2. Allowed for a good Cause of Challenge to one of the Petty Jury, if he hath been of the Grand Jury that found the Bill, *Oates's 1st Trial* 1.

3. In Treason the Prisoner accused may challenge 35; and therefore there is a Return generally, of 60 or 80. and when he has challenged as many as he please, the twelve Men that stand next are to be of the Jury, *Lord Russel's Trial*, 31.

4. Peremptory Challenge is not allowable, but where the Life of Man comes in Question. At Common Law he might have challenged peremptorily 35, that is under three full Juries; if he challenged above he should be hanged: But by the *Stat* 22 H. 8 c. 4. made perpetual by 32 H. 8. c. 3. it is reduced to 20;

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and if he challenge above 20, he shall not be therefore hanged, but his Challenge shall be over-rul'd, and put upon his Trial: Yet *quare* Hale P. C. 259. But in Case of Treason, or Petty Treason, the Challenge of 35 is restored, by Stat. 1 & 2 P. & M. 10. Hale P. C. 260.

Vide Mute 1.

Clergy.

1. Where Clergy is allowable, it is to be allowed as well where the Party is convict by Confession, as by Verdict, and where he stands mute, Hale P. C. 231.

2. One admitted to his Clergy, shall notwithstanding his Purgation, answer for other Offences formerly committed, Stat. 8 Eliz. c. 4. Before, (by Reason of the Stat. 25 E. 3. 5. which says a Clerk shall be arraigned of all his Offences at once) *Auterfoits convict* and Clergy, had been a Bar to an Arraignment of any other Felony, tho' not within Clergy, Hale P. C. 249.

This possibly may be the Occasion of that Error, which the lesser Criminals at the *Old-Baily* so often use, when they plead Guilty to this, and all other Felonies within the Benefit of Clergy; though they are as often told they can plead only to what they are indicted.

3. None shall have the Benefit of Clergy twice, unless he be really in Orders, Stat. 4 H. 7. c. 13. H. P. C. 239.

4. Ecclesiastical Persons being convict of Manlaughter, and having their Clergy, shall not be burnt in the Hand, *Propter ordines*, Hob. 288, 294. Neither shall a Baron of this Realm, in the like Case, be burnt in the Hand,

Hand, *propter honorem*, Stat. 1 E. 6. c. 12. Sect. 14.

5. The King may pardon Burning in the Hand after Conviction, and that as well in an Appeal as upon an Indictment: And the Burning being pardoned, he shall be delivered out of Prison of Consequence, Co. Rep. l. 5. fo. 50. *Biggin's Case*.

6. A Man discharged of Burning in the Hand shall be immediately discharged of his Imprisonment, Co. *ubi sup.* Yet the Justices, if they see Cause, may detain the Party in Prison for some Time not exceeding a Year, Stat. 18. Eliz. c. 7. Sect. 2, 3.

7. By the 3 & 4 W. & M. 9. it was enacted, That if a Woman should be convicted of any Offence, for which a Man might have the Benefit of his Clergy; upon her Prayer to have the Benefit of this Statute, Judgment of Death shall not be given against her, but she shall suffer the same Punishment a Man should suffer in the like Case. Women to have the Benefit of Clergy.

8. By the same Statute, Clergy was taken away from such as should break any Dwelling-house, Shop, or Warehouse thereunto belonging, or therewith used, in the Day-time, and feloniously take away Money or Goods to the Value of five Shillings, though no Person were therein. Persons breaking Houses, Shops, &c. and stealing the Value of 5 s. excluded Clergy.

9. By 10 & 11 W. 3. cap. 23. it was enacted, That all Persons who by Night or Day after the 20th of May 1699. should in any Shop, Ware-house, Coach-house or Stable, privately and feloniously steal any Goods, &c. to the Value of five Shillings, though such Shop, &c. were not broke open, and whether the Owner or any other Person were or were not in such Shop, &c. And whoever shall assist Persons stealing the Value of 5 s. out of any Shop, Ware-house, &c. though not broke open, are excluded Clergy.

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in the committing such Offence, being thereof convicted, shall lose the Benefit of Clergy.

Reading taken away.

10. By 5 *Annæ*, cap. 6. If any Person shall be convict of such Felony, for which he ought to have the Benefit of Clergy, and shall pray the Benefit of this Act; he shall not be required to read, but shall be punished as a Clerk convict.

Persons stealing the Value of 40 s. out of a Dwelling-house excluded Clergy.

Not to extend to Apprentices under fifteen.

Breaking out of a House, excluded Clergy.

11. By 12 *Annæ*, cap. 7. Persons stealing Money or Goods to the Value of 40 s. out of any Dwelling-house or Out-house thereto belonging, though such House or Out-house are not broke open, they and their Accomplices are excluded the Benefit of the Act which comes in the room of Clergy: Provided it do not extend to Apprentices under fifteen Years of Age who rob their Masters. Persons getting into a House by Day or Night, with an Intent to commit Felony, who in the Night-time shall break the said House to get out, shall be deemed guilty of Burglary, and excluded the Benefit of Clergy, *Ibid.*

Commitment.

1. People apprehended upon Suspicion of Robbery, and had before a Justice, ought not to be committed without Oath, Lord *Hollis's Narr'* of the Trial of 5 *French Gent.* 4. 38.

2. Subjects of this Realm committed for any Crime, shall not be removed into Custody of any other Officer, unless by *Hab. Corpus*, or some other legal Writ in due Course of Law, or in Case of Fire, Infection, or other Necessity, *Stat. 21 Car. 2. c. 2. Sect. 9.*

3. No Person who shall be delivered or set at large upon any *Habeas Corpus* shall be again recommitted for the same Offence, by any Person

Person or Persons whatsoever, other than by the legal Order or Process of such Court wherein he shall be bound by Recognizance to appear, or other Court having Jurisdiction of the Cause, *Stat. 31. Car. 2. c. 2. Sect. 6.*

4. No Subject inhabiting in this Realm, shall be sent Prisoner into *Scotland, Ireland, Jersey*, or any foreign Parts, except Persons contracting to be transported, or Felons praying Transportation, *31 Car. 2. c. 2. Sect. 12, 13, 14.*

Confess. v. Overt-Act. 5.

1. Parties have sometimes confessed themselves Guilty, falsely. The Case of *Harrison* of *Campden* in *Gloucestershire*, who appeared alive many Years after three had been hanged for his Murder, one of which confessed. Also the Truth of Witches Confession against themselves hath been often doubted; it seems therefore that there ought to be good Circumstances concurring.

Copy.

1. Copy of Indictment, or Counsel, in Cases of Treason, not grantable by Law, *Sidn. Trial 7.* And this notwithstanding *46 E. 3.* which (as *Mr. Sidney* alledged) provides that *tout gents* shall have a Copy of every Record, *Ibid. 9, 10.*

2 But now by the *Stat. 7. W. 3. c. 3.* Every Person accused or indicted for High Treason, whereby any Corruption of Blood may be made, or for Misprision of such Treason, shall have a Copy of the whole Indictment (but not the Names of the Witnesses) five Days at least

least before the Trial, his Attorney or Agent requiring the same, and paying Fees for Writing, not exceeding 5 s.

3. Also by the said Statute such Person shall have a Copy of the Jurors who are to try him, at least two Days before the Trial.

4. Before the said Statute, the Prisoner might not have a Copy of the Indictment, but was sometimes indulged a Copy of the Panel, though it was not his Right, *Lord Russel's Trial*, 29, 30.

Counsel.

1. In collateral Matters any one may be of Counsel with the Prisoner, without Assignment, 2 *Jones, Rep.* 180. *O Carney's Case*.

2. Prisoner hath not Counsel in Treason, because the Proof must be plain, *Colm. Trial*, 17. Co. 3 *Inst.* 137.

3. In those Cases where a Man can have no Counsel, (as Treason, &c.) the Court is of Counsel for him; but where he may have Counsel, the Judges are not of Counsel for the Prisoner, *Oates's 1st Trial*, 66.

4. Counsel in Treason not grantable, except in some special Point of Law, there Counsel may be granted, *Sydn. Trial* 7. Co. 3 *Inst.* 137.

5. But now by the Statute of 7 W. 3. c. 3. If any Person indicted for High Treason, whereby any Corruption of Blood may be made, or Misprision of such Treason, shall desire Counsel, the Court before whom he shall be tried, shall assign him such Counsel as he desires, not exceeding two, who shall have free Access to him at seasonable Hours.

6. A Prisoner indicted and demanding Counsel, and having it, if he refuses to plead as his Council advises, Judgment shall go against him as his Crime requires, 3 Cro. 175. *Jesse's Case*.

7. What the Prisoner may alledge to obtain Counsel as to Matter of Law, see Co. 3 Inst. 137. viz. Such Matters as may make the Proceedings erroneous, and of such it is lawful for any Man then present in Court, to inform the Court, Co. 3 Inst. 29 & 137.

County.

1. In Trials of Treason, it is not material that the Fact be proved to be done in the particular Parish laid in the Indictment, it is sufficient if proved to be done in the County, in any other Parish, *Charnock's Trial*, 71 & *alibi*.

Vid. Place. 1 Trial 11, 12.

Defence.

1. **BY** *Wi. Williams*, in all Cases where a Person swears directly against a Defendant, the Defendant or his Counsel (in Case the Cause admits of Council) must endeavour to shew from Circumstances arising out of the Fact, and farther Circumstances attending the Fact, and by probable Arguments, and reasonable Inductions out of the Evidence, that the Defendant is Not guilty: This where direct Evidence of his Innocence cannot be had, *Hambden's Trial*, 19.

Demurrer, Vide Plea.

Depositions:

Depositions.

1. In Trial for Murder, Depositions taken before the Coroner, may be read for Evidence, if the Party be either dead or beyond the Seas. *Secus*, Depositions taken before a Justice of Peace, 2 *Jones Rep.* 53. yet *Hale P.C.* 263. says, Depositions before a Justice may be read; but in Prudence, the Justice or his Clerk ought to be sworn to the Truth of the Examinations.

Evidence.

1. **A** Witness may make Use of Notes to refresh his Memory, but his Testimony must not be meerly to read them, *Coleman's Trial*, 48.
2. A Man may give Evidence though he be sworn of the Jury, *Reading's Trial*, 11.
3. Printed Trials not allowed to be cited for Evidence, 5 *Jes. Trial*, 45. *Langhorn's Trial*, 17, 50.
4. Hearsay or a Report of what another Man said, is no Evidence against a Prisoner, *Langh. Trial*, 22. *Lord Ruff. Trial*, 48.
5. An Approver (who is one that confessing himself guilty of a Felony, accuses another of the same Crime) hath a Penny a Day; By *North Chief Justice*, to shew that *Oates* and *Bedlows* Maintenance from the King was no Objection against their Evidence, *Langh. Trial*, 27.
6. A Copy of a Record in the Lords House, would not be admitted to be given in Evidence at *Langhorn's Trial*, (p. 44.) nor was he

he allowed to prove by Witnesses what *Oates* had affirmed in Relation to him at another Trial, *Langb. Trial*, 45, 49.

7. The Journal of the House of Commons, no Evidence; because they have no Power to give an Oath, but the Proceedings of the House of Peers are Evidence, because that is a Court of Record. By *Jeffreys* Ch. Justice, *Oates's 1 Trial*, 55. An Order of Court-Baron no Evidence, otherwise the Judgment of a Court-Leet, *Id. ib.*

8. If a Witness be sworn to a particular Thing, and speak to another Matter which he was not sworn to give an Account of, this can never be Evidence, by *Jeffreys* Chief Justice, *Oates's 1st Trial*, 65.

9. Hearsay is admitted for Evidence where it is to establish another Witness's Testimony; as where a second swears that he heard the first Witness declare the same Thing formerly, *Oates's 1st Trial*, 70.

10. Where two Facts are alledged of the same Man, and it be questioned whether it be the same Man, it is sufficient that it is so reported; and this is good Evidence, unless some one else of the same Name be produced, *Oates's 2d Trial*, 15.

11. By *Jeffreys* Chief Justice. Though in Strictness we do not use to admit of what others have sworn at another Trial, unless the Party be dead that swore it, yet the Prisoner is sometimes indulged so far as to be admitted to prove it, *Oates's 2d Trial*, 40.

12. Evidence may be given in Treason, to shew the Temper of the Prisoner's Spirit, and how his Inclination hath been all along, tho' that be not the Thing for which he is directly called in Question, *Rouse, Tri.* 69, 70.

13. Hearsay

13. Hearsay from others is not to be applied immediately to the Prisoner; however those Matters that are remote at first, may serve to prove there was a general Conspiracy to destroy the King and Government; and so was the constant Rule and Method about the Popish Plot, first to produce Evidence of the Plot in general. By Chief Justice. *Sidn. Tri.* 56.

14. No Witness admitted to prove what another had formerly said in Evidence, though that Party be now disabled to come into Court himself, *Hamb. Tri.* 31.

15. The Opinion of a third Party against the King's Witness, on Behalf of the Prisoner at the Bar, not admitted as Evidence. As to prove that the Lord E. had no good Opinion of the Lord H. who gave Evidence against Mr. H. makes nothing for Mr. H. *Hamb. Tri.* 36.

16. It is not regular to produce any Evidence without first opening it, *Rookwood's Tri.* 63.

17. By the late Act for regulating Trials in Cases of Treason, 7 W. 3. c. 3. no Evidence is to be admitted of any Overt Act, that is not expressly laid in the Indictment; but it does not exclude Evidence in Order to prove an Overt Act laid, though such Evidence be not laid, *Rookw. Tri.* 74.

Vid. *Baron* 2. *Depositions* 1.

Examination 3. *Trials* 3, 5.

Examination.

1. **P**ERSONS accused of Manlaughter or Felony, who for want of Bail are to be sent to Prison, must be examined before the Justice before he commits them, and the Accusers

cusers bound over to appear and give Evidence against them at the next Gaol Delivery, whose Examination must be taken and committed to Writing within two Days at the farthest, and certified by the said Justice, with the Bonds or Recognizances of the Accusers at the said next Gaol-Delivery, *Stat. 2 & 3 P. & M. c. 10.*

2. Examination before a Justice, must be only subscribed to by the Offender, and not upon his Oath; but Examination of others must be upon Oath, *Hale P. C. 262.*

3. These Examinations, if the Party be dead or absent, may be given in Evidence; but not Examinations relating to a forcible Marriage, in a Trial upon the *Stat. 3 H. 7. c. 2. H. P. C. 263.*

4. Prudence requires that the Justice or his Clerk be sworn to the Truth of the Examinations, *Vid. ib.*

Exception.

1. No Exception to Witnesses in Treason, because they have been concerned by their own shewing in the same Crime, for they are the most proper Persons to be Evidence, none being able to detect such Councils but them, *Lord Russels Trial, 61.*

Vid. inf. Quashing 1. Indictment 3.

Execution.

1. Executions must be pursuant to the Judgment, and cannot be altered by the King, as in Felony, from hanging to beheading, *Hale P. C. 268, 272.* But the King may pardon Part of the Execution, as in Treason he may

H h

pardon

pardon all but beheading, *Hale P. C. 272.* Yet there have been some Instances of beheading after Judgment in Felony, as of *Edward Duke of Somerset* in the Reign of *E. 6.* and *Mervin Lord Audley* in the Reign of *Ch. 1.* so of some Women who have been beheaded, though the Judgment is not so, neither in Felony nor Treason, *Vid. Co. 3 Inst. 211.*

2. If the Sheriff or other Officer, where he ought to hang the Party attainted, according to his Judgment, or Charge, will burn or behead him, or *è converso*, the Law in this Case implieth Malice, *Co. 3 Inst. 52.*

3. If a Lieutenant or other in Time of Peace, hang or otherwise execute any Man by Colour of Martial Law, this is Murder, *Id. ibid.*

Feme-Covert.

1. **T**HE Wife, (nor the Wife's Examination) is not to be produced or used, neither for nor against her Husband, *Hale's P. C. 263. Co. Lit. fo. 6. b.* Nor the Husband against his Wife, except in Treason, *Raymond's Rep. p. 1. Mary Grig's Case.*
Fines. v. Bail 9.

Habeas Corpus. v. Bail 1.

Hearsay.

See *Evidence*, 4, 9, 13, 14, 15.

1. **T**HE two Witnesses required in Treason, must not give Evidence only by *Hearsay*, *Hale P. C. 262.* *Homicide.*

Homicide.

1. The Presence and Abetment in a Homicide done by another, makes a Man guilty in that Case, as well as in the Case of Murder,
 2 *Jones Rep.* 55.

Imprisonment.

1. **B**Y *Stat. M. Ch.* 29. No Freeman shall be taken, imprisoned, disseized of his Freehold, or Liberties or free Customs, outlawed, or exiled, nor otherwise destroyed; unless by legal Judgment of his Peers, or by the Law of the Land. And by the *Stat.* 25 *E.* 3. c. 4. none shall be taken, unless it be by Indictment or Presentment of lawful People of the Neighbourhood in due Manner, or by Process made by Writ original at the Common Law.

2. No Sergeant at the Mace, Bailiff, or other Officer whatsoever, shall convey or carry any Person in his or their Custody by Writ, Process, or other Warrant whatsoever; to any Tavern, Ale-house, or other Victualling or Drinking-house without the voluntary Consent of the Party, *Stat.* 22, 23 *Car.* 2. c. 2. *Sect.* 9.

3. If the Keeper or Under-keeper of a Prison, by too great *Dures* of Imprisonment and by Pain, make a Prisoner that he hath in Ward to become an Appellor (or Approver) against his Will, and thereof be attainted, he shall have Judgment of Life and Member, *Stat.* 14 *E.* 3. c. 10. Every Imprisonment is taken and deemed in Law *Duritia*, *Dures*; a

little Addition to it by the Gaoler is too great Dures in this Case, Co. 3 Inst. 91.

4. If a Gaoler keep the Prisoner more strictly than he ought of Right, whereof he dieth, this is Felony in the Gaoler by the Common Law, and this is the Cause that if a Prisoner die in Prison, the Coroner ought to sit upon him, *Id. ibid.*

5. In all Offences finable, the Imprisonment is only to be until the Fine is paid ; if the Fine be tendred, there is to be no Imprisonment at all, 1 Vent. 116.

Vid. Commitment 4.

Indictment.

1. The Word *Proditicrie* necessary in all Indictments of Treason, Reding's Trial, 8. In all Indictments of Death, the Word *Percussit* is necessary, except in Case of Poisoning, Co. Rep. li. 5. fo. 122. So in Rape, *Rapuit* ; in Larceny, *Felonice*, Hale P. C. 207. In Murder, *Murdravit* ; for these are *Vocabula artis*, Co. 5 Rep. 121. b.

2. An Indictment is no more than an Accusation, and in the Nature of the King's Count, and may be true or false, Co. 9 Rep. f. 118. a.

3. By the Stat. 7 W. 3. c. 3. No Indictment in Cases of Treason and Misprision of Treason, or any Process or Return thereupon, shall be quash'd on the Motion of the Prisoner, for mis-writing, false or improper Latin, unless Exception for the same be made by the Prisoner or his Counsel, before Evidence given in Court ; yet any Judgment given upon such Indictment may be revers'd upon a Writ of Error. The Court understood this to be before Plea pleaded, or at least before the Jury sworn,
Rook-

Rookw. Tri. p. 20. *usq;* 36. But the Advantage of the Prisoner's Counsel slipping that Time, was waved, and the Counsel admitted to except, as to mis-writing, mis-spelling, false and improper *Latin*, before the Evidence opened; but they did not, for their Exceptions were said to be substantial, which might be moved in Arrest of Judgment after Verdict, *ub. sup.*

Vid. *Place, County.*

Infant.

1. Examination of an Infant of thirteen, nay of nine Years of Age, allowed in some Cases, *Hale P. C.* 263.

2. Infant within Age of Discretion kills a Man, no Felony; as if he be nine or ten Years old: But if by Circumstances it appears he could distinguish between Good and Evil, it is Felony; as if he hide the Dead, make Excuse, &c. but in such Cases, Execution in Prudence respited, to obtain a Pardon, *Hale P. C.* 43, 44.

Interruption.

1. The Prisoner and his Counsel have been heard in the midst of summing up the Evidence by the Court, to rectify a Mistake, *Rookwood's Trial*, 71.

2. No Observations ought to be made upon the Prisoner's Evidence, till he hath concluded to give all his Evidence, admitted for good Practice in *Lord Mohun's Tri.* 33, 36.

Vid. *Trial*, 8.

Jury.

1. In Capital Cases a special Jury shall not be stricken by the Clerk of the Crown in the King's Bench, as is usual by the Secondary in Civil Causes on Trials at Bar: Thus it was ruled in the several Cases of *Fitz-Harris*, *O Carny*, and *Farrington*, 2 *Jones Rep.* 222.

2. There is no Panel made in *London* by Freeholders, there being few Freeholders there capable of being impanelled, because the Estates of the City belong much to the Nobility and Gentry, who live abroad, and to Corporations; therefore in the City of *London* the Challenge of Freeholders is excepted, *Lord Russel's Tri.* 32. And the *Stat. 2 H. 5. c. 3.* extends not to this Case, and so ruled in the *Lord Russel's Case* at the *Old-Baily*; and it was there said, That at the Common Law Trials for Treasons might be without Freeholders of the Jury; and for Treason, Trials shall be according to Common Law by *Stat. 1 & 2 P. & M. c. 10.* *Lord Russel's Tri.* 36. But now by the *Stat. 1 W. & M. Sess. 2. c. 2.* it is declared and enacted (*inter alia*) That Jurors ought to be duly impanelled and returned, and Jurors which pass upon Men in Trials for High Treason ought to be Freeholders.

3. No *Medietas Linguae* is allowed in Treason, nor in any Appeal of one Alien against another, nor shall a Scot be accounted an Alien to have a *Medietas Linguae*, nor Egyptians. *Medietas Linguae* must be prayed by the Prisoner, and the Jurors need not be of the same Nation, but any Aliens, *Hale P. C.* 260, 261. *vid. Dyer* 144, 145.

Vid. Challenge 2, 3.

Alcan.

Means.

1. IF the Indictment be of poisoning with one Poison, and it is proved with another ; or killing with a Dagger, and it is proved with a Staff, yet it maintains the Indictment ; for it agrees in Substance and Kind, though not in the Means. But if the Indictment and Evidence differ in *specie Mortis*, as Indictment of Poisoning, Evidence of Stabbing, this maintains it not, *Hale P. C. 265.*

Medietas Linguae. v. Jury 3.

1. By the *Stat. 28 E. 3. c. 13. Sect. 2.* all Enquests made among Aliens and Denizens, be they Merchants or other, although the King be Party, shall be one half Denizens, and the other half Aliens, if there be so many in the Town, if not, so many as are ; and these Aliens are not required to have 40 s. Freehold *per An. 9 H. 6. c. 29. n. 13.*

Mute.

1. To challenge above 35, is the same as to stand Mute, and he shall have *Pain fort & dure.* But in an Appeal, standing Mute, Judgment is to be hanged ; so for Felony within the Verge ; and in Treason it is a Conviction, *Hale P. C. 226. Co. 2 Inst. 178.* This forfeits no Land, nor works any Corruption of Blood, *Co. Lit. fo. 391.*

Noli prosequi, vid. Trial, 14.

Non Compos.

1. **I**F a Man that is *Non Compos*, kills another, this is no Felony; so of a Lunatick during his Lunacy. But he that incites a Mad-man to kill another, is a principal Murderer. A Man that is drunk killeth another, this is Felony, *Hale P. C. 43.*
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Oath.

1. **E**Vidence for the King always upon Oath, not so for the Prisoner, yet no known Law to restrain it. But in some Cases by the Statute Evidence is to be upon Oath for the Prisoner, as 31 *Eliz. c. 4. Sect. 2.* & 4 *Jac. 1. c. 1. Sect. 27.* *Hale P. C. 264.*
2. Witnesses in capital Cases against the King for the Prisoner, cannot be sworn, but the Jury is to take heed of what they say, and to be governed by it according to the Credibility of the Person and of the Matter. Lord Chief Justice in the 5 *Jes. Trial, 45.* *Co 3 Inst. 79.* says, there is not so much as *Scintilla juris* against it, and that Evidence against the Prisoner should be so plain, that nothing could be answered against it; and therefore no Evidence to be sworn against the King, 5 *Jes. Tri. ib.*
3. Now, by the Statute of 7 *W. 3. c. 3.* It is provided and enacted that Persons accused, or tried for High Treason where by any Corruption of Blood may be made, or
Mis-

Misprision of such Treason, shall be admitted to make any Proof by lawful Witness or Witnesses, who shall then be upon Oath.

4. To take a Man's Life away by a false Oath, is Murder, by *Scroggs Chief Justice, Coleman's Trial*, 17.

Vid. *Commitment*, 1. *Examination*, 2.

Overt-Act.

1. Compassing the King's Death is Treason by the Words of the Statute 25 E. 3. And meeting in Council to raise a Rebellion, is an Evidence of compassing, and an *Overt-Act* declaring the same, *Lord Russell's Tri.* 51, 57.

2. If a Man should be indicted only for High Treason in levying War, here a contriving to levy War is not a sufficient Evidence, without an actual War levied; but if he be indicted for compassing and imagining the Death of the King, there the contriving such a War is an *Overt-Act* of the compassing and imagining, *Sidon's Tri.* 56.

3. Though some Judges have been of Opinion that Words of themselves are not an *Overt-Act*, yet no Sage of the Law ever questioned, but that a Letter was an *Overt-Act* sufficient to prove a Man guilty of High Treason, for *Scribere est agere*, *Sidney's Tri.* 56.

4. Loose Words spoken without Relation to any Act or Design are not Treason; but Arguments and Words of Persuasion to engage in a treasonable Design and Resolution, and directing and proposing the best Way for effecting it, are *Overt-Acts* of High Treason; so consulting together for such a Purpose is an *Overt-Act* of High Treason: For it is the Imagination, the compassing and designing

signing the Death of the King, that is the Treason; but there is no Way of Discovery of those Imaginations, in order to punish a Traitor, but by some external Act, Chief Justice in *Charnock's Trial*, 65. And that which is a sufficient Manifestation of such a Design is an *Overt-Act*, *Id. ibid.*

5. By the late *Stat. 7 W. 3. c. 3.* no Person shall be indicted, tried or attainted of High Treason, whereby Corruption of Blood may be made, or Misprision of such Treason, but by the Oaths and Testimony of two lawful Witnesses, either both to the same *Overt-Act*, or one to one, and the other to another *Overt-Act* of the same Treason, unless the Party willingly in open Court confess, stand mute, or peremptorily challenge above 35.

Outlawry, vid. Witnesses.

Panel.

1. **B**Y the *Stat. 7 W. 3. c. 3.* the Prisoner for High Treason, or Misprision, shall have a Copy of the Panel of the Jurors, who are to try him, duly returned by the Sheriff, and delivered to him two Days before the Trial. This shall be understood two Days before the Trial, after the Panel is made, and not after it is returned into the Court; for then the Trial is to commence, *Rookwood's Trial*, 13.

Pardon.

1. Pardon good and sufficient after Indictment, though it doth not recite the same, if it hath other Words tantamount, such as, *five fuit*

fuist Indictatus sive non, 2 *Jones Rep.* 56. *vid.* 1 *Vent.* 207.

2. A Pardon takes away as well all Calumny as liableness to Punishment, and sets an Offender right against all Objection, *Reading's Trial*, 53. It takes away not only *Pœnam*, but *Reatum* also, *Hob. Rep.* 81.

3. A Pardon of Felony (though after burning in the Hand) restores a Man to be a Witness: But in Case he had been convicted of Perjury, and afterwards pardoned, that would not enable him to be a Witness, 1 *Vent.* 349.

4. Charter of Pardon, no Bar of Appeal. *Hales P. C.* 251. yet the King may pardon burning in the Hand upon an Appeal, *Id.* 252.

5. He that hath a Pardon, must sue forth a Writ of Allowance, specifying that he hath found Surety for his good Behaviour: which he is obliged to do by the Statute of 10 E. 3. c. 3. and if he afterwards breaks the Peace, the Pardon shall be void by the Statute, and he hanged for the first Offence, unless the Pardon be with a *Non obstante* to the Statute, *Hale P. C.* 252.

6. Pardon after Attainder, does not make a Felon capable of being a Juryman, nor a Witness; *secus*, if burnt in the Hand, 2 *Brownlow* 47. 2 *Bulst.* 154. *Brown and Crashaw's Case* urged in *Rookwood's Trial*, p. 41. But overruled, p. 42, 43. yet allowed by the Chief Justice, That this may be objected against his Credit, but is not to be urged against his being a Witness, *Ib.* 44.

Vid. Clergy 5. *Particeps Criminis*, 1, 3.

Particeps Criminis.

1. *Langhorn* urged at his Trial, That if an Approver (*i. e.* one who confesses Felony committed by himself, and appeals or accuses others to be guilty of the same) be pardoned, the Appellee ought to be discharged; and for the same Reason, if those who have been *Participes Criminis* have got their Pardons, they ought not to be accounted substantial Witnesses against a Prisoner at the Bar: But this was over-ruled, *Langhorn's Tri.* 27.

2. No Exception to a Witness in Treason, because they have been concerned, by their own shewing in the same Crime; for they are the most proper Persons to be Evidence, none being able to detect such Councils but them, *Lord Russell's Trial*, 61.

3. *Particeps Criminis*, whether pardoned or not, admitted as a Witness for the King in High Treason, *Sidney's Trial*, 13, 30. So also upon a Penal Statute, 2 *Jones Rep.* 155. the King and *Benison*.

Vid. *Witnesses*, 5, 9.

Peer, v. Baron.

Place.

1. If the Indictment lay the Felony at one Place, the Evidence proving the Fact at another Place in the same County, maintains the Indictment, *Hale P. C.* 264.

2. Regularly he that pleads any special Matter in Cases capital and confesseth not the Felony, if the Plea be found against him, the Felony notwithstanding shall be enquired of,

of, and therefore he shall plead over to the Felony, *Hale P. C.* 254. *Secus*, where the Prisoner demurs to the Indictment, for that amounts to a Confession of the Fact, *Co. 2 Inst.* 178. *Hale P. C.* 243.

See *Clergy* 2.

Proof.

To prove a Hand-Writing by Similitude, and by those who have known the Hand, though the Party was not seen to write it, was allowed sufficient Proof of a treasonable Writing, in *Sidney's Case*; for this is said to be as much Proof as the Thing is capable of, especially where Writing was found in his Possession, *Sidn. Tri.* 51. Yet *Sidney* said, it had been declared in the *Lady Car's Case*, to be no lawful Evidence in Criminal Cases, *Sidn. Tri.* 32.

Quashing.

Indictment of Manslaughter not to be quashed upon Motion, *1 Vent.* 110. Nor Indictments of Perjury, Nulance, or the like, but the Party must plead, *Id.* 370.

See *Indictment* 3.

Time.

IF the Indictment be of a Felony, &c. at one Day, though the Evidence be of another Day, the Jury may find generally against the Prisoner; and leave the Person concerned in Point of Time to falsify; or the Jury may find

find the true Day upon their Verdict, *Hale*
P. C. 264.

Vid. *Trial*, 9.

Treason.

1. All Persons indicted and tried for High
Treason, must either be convicted of that
Crime or acquitted ; they cannot be found
Guilty of Misprision of Treason, *Wakeman's*
Trial, 83.

2. In Case of Treason, two Witnesses are
required by the Statute of 1 E. 6. c. 12. ex-
cept Treason for counterfeiting Coin, *Hale*
P. C. 262.

3. The Statute of 7 W. 3. c. 3. intituled,
An Act for regulating of Trials in Cases of Treason and Misprision of Treason, hath enacted several Matters in relation to such Trials ; for which, see Counsel 4. Evidence 16. Indictment 3. Copy 2. Oath 4. Overt-Act 5. Panel 1. Witness 20. By the said Statute, there is a Limitation of Time for finding the Indictment, *viz.* within three Years after the Crime committed, or three Years after the 25th of *March* 1696. for Treasons committed before that Time : Excepted out of this Limitation, Persons designing or attempting any Assassination on the Body of the King by Poison or otherwise. This Act not to extend to any Impeachment or other Proceedings in Parliament, nor to Treasons for counterfeiting the King's Coin or Seals.

Trial.

1. To desire a Trial by *Ordeal* (there being
no such Trial now used) was said to be an ar-
tificial

tificial Varnish to take with the Auditory,
5 *Jes. Tri.* 68.

2. By *Scrogs* Chief Justice, the Jury must not take Notice of any Thing that was done at a former Trial, unless it be spoken of now, 5 *Jes. Tri.* 69. And a Prisoner must not call any Witnesses to prove what was said then, but to disprove what is said now, *Id.* 70.

3. Regularly the Prisoner should not ask Questions but the Court, and the Prisoner propose the Question to the Court, *Langborn's Tri.* 14.

4. The same Matter may be examined and tried over again, by another Jury in another County, though tried the Day before, *Langb. Tri.* 15.

5. Incoherent Evidence hath been some Times taken favourably, and seeming Contradictions reconciled, *Wakeman's Tri.* 15.

6. A Prisoner may be arraigned and tried at the same Time in capital Crimes, Lord *Russel's Tri.* 29.

7. The King's Counsel are to have the last Word, *Oates's 1st Tri.* 59.

8. By *North* Chief Justice, the Prisoner must have Liberty to ask Questions while the Evidence is giving, because there are some Questions, that else may be forgotten, and the Opportunity will be lost; but when he hath asked those Questions, he is to make his own Observations upon them in private to himself, and afterwards it will be Time for him to argue upon it, when the King's Counsel have done their Evidence. Before, it will do him little Service, and cannot be permitted, *Wakem. Tri.* 19. *Vid. sup. Interruption 2.*

9. A Criminal can demand no Time to prepare for Trial, for those who will commit Crimes, must be ready to answer for them and defend themselves, *Rouse's Tri.* 63.

10. Upon good Cause shewn, a Verdict for the King in an Information for Perjury, has been set aside, and a new Trial awarded, 2 *Jones Rep.* 163. the King and *Smith.*

11. A Person examined before the King's Counsel, or three of them, upon any Treason, Misprision of Treason, or Murder, and confessing the same, or vehemently suspected by the said Counsel, the King may direct his Commission of Oyer and Terminer for trying the same, into such County or Place as he pleaseth; and here no Challenge for the County or Hundred shall be allowed, *Stat.* 33 *H. 8. c. 23. Sect. 1.*

12. Where any Person is feloniously stricken or poisoned in one County, and dieth of the same in another County, an Indictment or Appeal, may be brought in the County where the Party dies, *Stat.* 2. 3 *E. 6. c. 24. Sect. 2, 3.*

13. Justices of Peace, and Oyer and Terminer, cannot make their *Venire facias* to try an Issue, returnable the same Sessions; but Justices of Gaol-Delivery may, for their Panel is returned by the Sheriff without any Precept, *Hale P. C.* 256.

14. Attorney-General may enter a *Noli prosequi*, and stop Proceedings upon an Information, at the Trial after the Jury was sworn, 1 *Vent.* 33.

15. Prisoners for Treason were indicted, arraigned, and in their Trial, and then the Jury discharged of them, because but one Witness against them, and the same Persons were afterwards tried again for the same Fact,

and condemned, *Ireland's Trial* 55. This was because they had not been before in Jeopardy of their Lives, (as the Court said) because the Charge of the Jury is not full, till the Court give them their Charge at last after the Evidence, and the Jury are sworn to try such Prisoners *as they shall have in Charge*, 5 *Jes. Tri.* 5. By North Chief Justice. *Bedlow* being sworn to say *the Truth, the whole Truth, and nothing but the Truth, in Relation to Whitebread, &c.* at *Ireland's Trial*, said afterwards, *that he did not then say all, nor half that he could have then said*, 5 *Jes. Tri.* 32. He also said in Court, *I cannot prove it without bringing some Witnesses that I have behind a Curtain, and I will not discover them until another Trial (then intended)* *They shall not know who they are*, 5 *Jes. Tri.* 34. This though it will not take away his Evidence, yet it goes to the lessening the Credit of it, by North Chief Justice, 5 *Jes. Tri.* 76. It was urged by *Whitebread*, that *Bedlow* being sworn to say *the Truth, and the whole Truth*; if he did not say *the whole Truth*, he is perjured; if he did, he can say nothing against me now, 5 *Jes. Tri.* 76. But it seems a Man shall not appear perjured by a Logical Argument or Dilemma, so as to take off his Evidence, without producing a *Witness* 12. *Vide infra*
Record of his Conviction of Perjury. Yet this Case of *Whitebread*, and the Jury's being discharged of him, being cited many Years after, was said to be a singular Precedent, and the Authority hardly allowed, *Rookwood's Tri.* 24.

16. By the Statute of 7 *W. 3. c. 3.* All Peers who have Right to sit in Parliament, shall be summoned upon Trials of any Peer or Peerefs for Treason, at least 20 Days before such Trial.

Verdict.

TH E Verdict in Cases capital must be given openly in Court, and no privy Verdict, *Hale P. C. 267.*

Witness. Vide Evidence.

1. **T**W O Witnesses to the same Fact, tho' at several Times, sufficient, *Ireland's Tri. 55.*

2. If a Witness denies what he formerly discovered upon Oath, he is not allowed to be perjured, so long as that Denial is not upon Oath, *Green's Tri. 23.*

3. In Cases not Capital, a Witness for the Prisoner shall be sworn, *Reading's Tri. 43.* But in capital Cases, a Witness against the King for the Prisoner cannot be sworn; but the Jury is to take heed of what they say, and to be governed by it according to the Credibility of the Person, *5 Jesh. Tri. 45.*

4. *Roman Catholicks* lawful Witnesses, unless such Objection can be produced to invalidate their Evidence, as would have the same Force against Protestants, *5 Jesh. Tri. 46, 64, 70. Oates's 2d Tri. 51, 52.* It was objected against Mr. *Langhorn's* Witnesses that they were Papists, and spake in a general Cause: To which he replied, That if they were not to be believed because Papists and Friends, then the other, or the contrary, are not to be believed, because they are Enemies, *Langh. Tri. 58. Oates cited Bulstrode's Rep. 2 Part, 155.* as my Lord *Coke's* Practice, that a Popish Recusant is not

to be admitted a Witness between Party and Party. Over-ruled, as against Law, *Oates's 1st Tri. 73.*

5. If a Man stand charged with the same Crime with the Prisoner, though he be not convicted, his Evidence on Behalf of the Prisoner is of little Weight, *5 Jesh. Tri. 73. Vid. infr. 9.*

6. A Man that hath stood in the Pillory, is counted an infamous Person, and cannot be taken for a Witness, by *North Chief Justice, Langborn's Tri. 28.* *Vide antea Evidence by Witnesses.*

7. One attaint of Conspiracy, Forgery or Perjury, or duly set in the Pillory, not allowed to be a Witness, *Hale P. C. 263.* One convict of Perjury can never be a Witness, though he hath a Pardon, *Siderf. 52.* A Party outlawed (of Felony) is no *legalis Testis*, *Trin. 32 Car. 2. B. R. in Cellier's Case, Sid. vid. Co. Lit. f. 6. b.*

8. One convict of Perjury, *Præmunire*, Forgery, *Stigmaticus*, Pillorized, or other infamous Person, an Infidel, *Non compos*, or a Party interested, and regularly all such as lose their *liberam Legem*, are not sufficient Witnesses, *Co. Lit. f. 6. b.*

9. In an Information in the Crown-Office for a Riot, two of the Defendants (no Witnesses appearing against them) were allowed and sworn as Witnesses in Behalf of the other Defendant, *Siderf. 237. the King and Bedder.*

10. A Man retained of Counsel for the Prisoner, or his Attorney or Solicitor may not be examined against him, for he is obliged to keep his Secrets, *1 Vent. 197. Cuts and Pickering.*

11. It is a Maxim in Law, That Witnesses cannot testify in the Negative, but in the Affirmative only, *Co. 2 Inst. 662.*

12. A Matter may be sworn false, and yet the Witness is not guilty of Perjury till he be indicted, and another Jury pass upon him; for it is one Thing to be forsworn and perjured, and another Thing to be proved so; and he is not proved to be so, but by a Record for that Purpose, by *Scrogs Ch. J. 5 Jfes. Tri. 70.*

13. Lord Chief Justice *Jeffreys* would not admit a Witness to swear, that he was forsworn at a former Trial: For he that has once forsworn himself, ought not to be a Witness after that in any Case whatsoever, *Oates's 1st Tri. 68.*

14. A Man is not compellable to be a Witness unless he be *subpœna'd* (and tendered Charges, *Vid. Stat. 5 Eliz. c. 9. Sect. 12.*) but if a Man will come without a *Subpœna*, and give Evidence in a Cause, this is no Objection to his Testimony, *Oates's 1st Tri. 14.*

15. It is a very unjustifiable and indeed a very horrid Thing, and severely to be punished, for Witnesses that come on Behalf of the Prisoner, to be hindred of free Ingress, and Regress, or molested or abused. By *North Ch. Justice*, and *Atkins Just. Langborn's Tri. 45.*

16. *Langborn* desired that he might examine some of his Witnesses, after the King's Counsel had done; but he was told he might then say what he would for his Defence, but not examine any new Witnesses, *Langborn's Tri. 47.*

17. Witnesses may be examined to give an Account of the general Tenour of the Conversation of a Witness against a Prisoner, but not of particular Crimes, *Rookwood's Tri. 64, 65.*

18. Two Witnesses, one to one particular Fact of Treason, and one to another, have been held sufficient in Law, for they are both *Overt-Acts* of the Treason. *Sir Henry Vane's Case,*

Case, and *Gaven's Case*, 5 *Jes. Tri.* 87, 88. So if the *Overt-Acts* were in two several Counties, *Colledge's Tri.* 12. The two Witnesses that the Statute (5, 6 E. 6. c. 10. Sect. 8.) requires in Treason, are not to the same individual Act, but to the same Treason; for if there be several Acts declaring the same Treason, and one Witness to each Act, it is sufficient, *Sidney's Tri.* 47, 56. *Lord Russel's Tri.* 50, 59. And this was the *Lord Stafford's Case*.

19. If in Case of Treason, there be but one Witness to prove a direct Treason, and another Witness to a Circumstance that contributes to that Treason, that will make two Witnesses. Resolved by all the Judges of *England*, *Sidney's Tri.* 59.

20. Now, by the Stat. 7 W. 3. c. 3 Witnesses for the Prisoner shall be upon Oath, in Cases of Treason whereby Corruption of Blood may be made, or of Misprision of such Treason; and no Person shall be attainted in such Cases, but by the Oaths and Testimony of two lawful Witnesses, either both to the same *Overt-Act*, or one to one, and the other to another *Overt-Act* of the same Treason, unless the Party willingly confess in open Court, stand mute, or challenge above 35 peremptorily, or be attainted by Outlawry; yet if the Party outlawed comes in, and is tried, he shall have the Benefit of this Law; and where two or more distinct Treasons of divers Kinds shall be alledged in one Bill of Indictment, one Witness to one, and another Witness to another Treason, shall not be deemed two Witnesses within the Meaning of this Act; and the Prisoners shall have like Process to compel their Witnesses to appear

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pear for them, as is usually granted for Witnesses against them.

Vid. *Bail* 8. *Baron* 1. *Copy* 2.

Evidence 2, 5, 14. *Overt-Act* 5.

Particeps Criminis 1, 2, 3.

Trial 15.

Words.

Vid. *Overt-Act* 4.

Writing.

Vid. *Proof* 1. *Overt-Act* 3.

F I N I S.

THE TABLE.

A

A Batement,	Page 24
Ability,	18
Absence,	303
Accessary,	259, 448
Account,	361
Accusation,	449
Acquittance,	338, 442
Action,	449
Action on the Case, <i>see</i> Evidence,	351
Admission, Institution, &c.	17, 18
Administration, 13, 330, 417. <i>See</i> Evidence.	
Affidavit,	207
Agistment,	398
Alien, <i>see</i> Trial <i>per medietat. Linguae</i> ,	193
Almanack,	20
Ambidexter,	217
Affize,	16, 82

Amendment.

Christian Name wrong in the *Venire*, and
 Right in the *Distringas* and *Postea*, not amen-
 dable, 52. The County omitted in the
li 4
Venire,

The TABLE.

<i>Venire</i> , whether it be amendable, 56. <i>Venire</i> directed but to one Sheriff in <i>London</i> , and held amendable, 59. Transcript of the Record of <i>Nisi prius</i> mistaken, and held amendable, 68. Verdict amended by the Notes, 75, 265. <i>Postea</i> may be amended on the Judge's Certificate,	248
Ancient Demesne,	13
Annuity,	12
Answer in Chancery,	356, 358

Appeal.

Appeal of Maihem, the Court may judge of it upon the View, 11, 12. Appeals touching Life, how tried anciently, 15. In Appeal against several, and one joint <i>Venire</i> awarded, if one challenge peremptorily, he shall be drawn against all, 130. Appeal by the Wife for the Death of her Husband, how prosecuted,	450
Appearance,	17
Approver	19
Arbitrator, <i>see</i> Award,	
Arraignment,	450

Arresting Judgment.

At what Time it may be, and what may be alledged in Arrest of Judgment, 275. What Matter of Record may be taken Advantage of in Arrest of Judgment, and what not, 288. The Course of moving in Arrest of Judgment, 289. The Court may enlarge the Time for arresting Judgment,	451
Affault and Battery, <i>see</i> Evidence,	323

Affize

The TABLE

Affize.

Trials by the Grand-Affize, introduced in the Room of Trials by Battel, and Trials by Fire and Water Ordeal, 16. Ejectments brought of late instead of Affize, 75. To make a Jury in a Writ of Right which is called the Grand-Affize, there must be sixteen, four of whom to be Knights, 82, 128. *see Evidence.*

Attachment foreign,	373
Attainder,	141, 260, 452
Attaint,	214, 221, 222
Attorney,	86, 217

Averment.

Want of Averment aided by the Verdict, 290.

Where the Averment need not be proved, 371. What Averments will be admitted upon or against a Deed, 436. Or upon or against a Record, 437. No Averment can be against such Certificates as are a definitive Trial, 441. Averment upon or against a Will or Administration, 442. No Averment admitted against common Presumption. 442. Valuable Consideration not expressed in the Deed may be averred, 444.

Books cited that treat of Averments,	446
Avoidance,	18

Award.

Award delivered to the Wife deemed Proof of a Delivery to the Husband, 376. Upon a Bond to perform an Award, and *nullum fecit Arbitrium* pleaded, how the Jury shall find, 261. If the Matter contained in an Award, and the Matter in the Submission do

The TABLE.

do not agree, it will hardly be supplied by
an Averment, 442

B.

BAIL, 313
Bar, 454

Baron and Feme.

Whether married or not married shall be tried by a Jury; but whether lawfully accoupled, by the Bishop's Certificate, 18, 187. Wife *subpœna'd* as a Witness, and the Husband sued for her not appearing, 313. Feme admitted a Witness against one her Husband prosecuted for a Cheat upon her self, 321. Debt against a Sheriff for the Escape of Baron and Feme, and the Baron only was taken in Execution, and yet held good, 237. Where the Wife may, or may not be an Evidence for or against her Husband, 304, 307, 326. A Promise to the Wife and the Husband's Agreement proves a Promise to the Husband, 367

Bastardy.

In Case for calling one Bastard, the Defendant justified he was a Bastard, this was awarded to be tried by a Jury, and not by the Ordinary, 14. Where Bastardy shall be tried by a Jury, and where by the Ordinary, 18, 100. Concealing of a Bastard-Child, how penal, 305

Battel.

Where Trial should have been by Battel, and who were the Judges, 15, 16. Trials by Battel

The TABLE.

Battel prohibited by the Canon Law, but not by Parliament,	21
Bills of Exchange,	368, 374, 351
Bills of Exception,	177, 353
Bishops,	10

Books, see Evidence.

A Shop-Book no Evidence after a Year,	341
What Acts of Parliament and Law-Books shall be allowed in Evidence,	348.
A Man's Account-Book shall be only Evidence against himself,	348
Bribery,	215

C.

C arrier,	415
Cafe, <i>see Evidence,</i>	352

Certificate.

The several Kinds of Trial by Certificate,	
7, 8, 19. Certificate of Assize what,	83.
No Averment against a Certificate,	441
<i>Certiorari,</i>	291

Challenge.

Challenge of a Juror tried by Witnesses	12.
Where the Suggestion contains a principal Challenge, Process shall be awarded to the Coroners,	42.
If the Plaintiff pray a <i>Venue</i> to the Sheriff, where he may challenge the Array, and where not,	46.
Challenge to the Array to be before any Juror sworn,	67.
Challenge defined,	122.
Challenge to the Array, what,	123.
Challenge for Affinity,	125.
Challenge to the Favour,	126.
Good Challenge to the Array, that the Sheriff	

The TABLE.

riff returned a Juror named by either Party, *ibid.* How the Challenge is to be made, 127. Where the King is a Party, no Challenge can be to the Array for Favour, 129. Of Challenges to the Polls, four Kinds, *viz.* Peremptory, Principal, Favour, or for Default of Hundredors, 130. Peremptory allow'd only in Treason and Felony, 130, 157. A Peer cannot challenge his Peers, 131. King's Challenge restrained, *ibid.* Principal Challenges to the Polls, four Kinds, 1. In respect of the Quality of the Jury. 2. By Reason of some Defect of the Juror. 3. For Affection or Partiality of the Juror. 4. *Propter delictum*, by Reason of some Crime committed by the Juror, 132. Challenge for want of Hundredors, 135. For Affinity, 137, 138. Peremptory Challenge upon Record, 139. Challenge for Malice, 141. At what Time Challenges shall be taken, 142, 149. Where he that challenges shall shew Cause presently, 143. In what Inquest a Challenge may be, *ibid.* Triors and Trials of Challenges, 144, 151, 152, 155, 158. In what Cases a Challenge or Affirmance by one shall serve for others, 145. In Wager of Law none shall be challenged, *ibid.* Challenge for that the Juror was Counsel, &c. 146. Parishioner challenged where the Right of the Church came in Question, 147. Of labouring a Juror, *ibid.* Challenges to the Favour, 148. *Propter delictum*, as being stigmatized, infamous, outlawed, &c. 149. Rules concerning Challenges and the Examination of a Juror, 153, 158. Challenges in Corporate Towns, 155, 470. Juror having been upon

The TABLE.

on the Grand-Jury challenged, 157. Pro- secutor entertained by a Juror, held a Cause of Challenge, <i>ibid.</i> The having found others guilty of the same Indictment, no Cause of Challenge, <i>ibid.</i> One who chal- lenged, 36. Adjudged to be hang'd, 158. Precedents containing Forms of Challenges, 159 to 184. Of Challenges in capital Ca- ses,	455
Chaplain, how his Retainer shall be proved,	313
Clergy,	456
Commissioners,	324, 329
Commitment,	458
Confession,	298, 325, 449
Continuance, <i>Plea puis darrein Continuance</i> ,	173, 435.

Copy, see Evidence.

When a Copy of the Indictment shall be al- lowed the Prisoner in Treason,	459
When a Copy of the Panel shall be allowed him,	460
Copyhold, 281, 282. See Court-Rolls and Evidence.	

Coroner, see Venire.

Where the Sheriff is not indifferent, the <i>Ve- nire</i> shall be directed to the Coroners,	41.
If neither Sheriff or Coroners be indiffe- rent, the Court shall choose two Elisors,	41.
All the Coroners must join in the Return of the Process,	59

Corporation.

Acts for the Sufficiency of Jurors not to ex- tend to Corporate Towns,	88
	One

The TABLE.

One challenged for being related to a Member
of the Corporation 138, 327
Counsel 314, 460
County, 96 to 121. See Jury.

Court-Rolls, see Evidence.

Copies of Court-Rolls, all the Evidence the
Copyholder hath of his Estate, 342. A
Copy allowed in Evidence where the Rolls
were lost, 348

Courts.

Customs of Courts shall be tried by the Judges
of the same Courts if they are pleaded
there, 10. Proceeding of Courts, not of
Record, shall be tried by the Country, 13.
Of the Jurisdiction of inferior Courts, 188

Criminal and Civil Causes.

Proceedings therein, 6. All Criminal Mat-
ters to be tried by the Country, 14. The
Statutes of Jeofails not extended to Procefs
in Criminal Causes, 52. Criminal Causes
to be tried in the County where the Of-
fence was committed, 193. No privy Ver-
dict shall be given in Causes which touch
Life or Member, 201
Customs of London, how to be tried, 14, 110.

D.

DAmages, 302, 400, 404
Debt, *see* Evidence, 375
Decies tantum, 217
Decree in Chancery, 359

Deeds

The TABLE:

Deeds, see Evidence.

Upon *Non est factum* pleaded to a Deed, there must be a Place alledged where the Deed was made, 9. Witnesses to the Deed were anciently joined to the Jury, 82. A Bond made beyond-sea, may be alledged to be made in any Place in *England*, 101. A Jury may find Deeds though not shewn in Evidence,

190

Demurrer.

Where Issue is joined for Part, and Demurrer for the Residue, the Court may try which they see fit first, 23. Precedents of Demurrers upon Evidence, 175, 176, 417 to 436. Where the Plaintiff gives in Evidence any Matter in Writing, and the Defendant demurs, the Plaintiff ought to join in Demurrer, 417. But if either Party offer to demur upon Evidence by Witnesses, the other Party need not join in Demurrer, *ibid.* The King's Counsel shall not be compelled to join in Demurrer, *ibid.* The Jury though discharged of the Issue by Demurrer, may assess Damages conditionally, or the Damages may be enquired of by a Writ of Inquiry afterwards when the Demurrer is determined, 418. A Demurrer on the Evidence is a Confession of the Fact, 423, 434. When a Demurrer is made upon the Evidence, the Evidence ought to be entred *Verbatim*, 432. There may be both a Demurrer to the Evidence, and a Plea *puis darrein Continuance*,

435

Depositions, *see Evidence*, 311, 357, 360.

Distringas, 34, 64. *see Venire.*

Discontinuance,

291

Divorce,

The TABLE.

Divorce,	18, 187, 289.
Dower, 12, 280. <i>see</i> Evidence,	384

E.

E cclesiastical Court, <i>see</i> Evidence,	356
Ejectment, 55, 75. <i>See</i> Evidence,	386
Elisors,	43

Embraceors.

How they shall be punished, 216, 217. <i>De-</i> <i>cies tantum</i> does not lie against an Embra-	
ceor if he takes no Money,	217
Emblements,	405
Enquiry, the Writ,	84
Escape,	304
Estoppels,	189, 234
Estray,	409, 414
Exception,	465
Executors, <i>see</i> Evidence,	330
Execution,	465

Evidence in general, Chap. 15. p. 292.

Of the meaning of the Word and of the several Kinds of Evidence, 292, 293. What may be given in Evidence, 294 to 297, 299 to 301. What Evidences the Jury may carry out of Court, 297, 300. Evidence by Confession of the Party, 298, 325, 459. Refusing to give Evidence, a Contempt, 302. On Indictments, Evidence may be of a Fact before or after the Time laid, 302. Where Persons shall be presum'd to be living, and where not, 303. No Evidence to be given of Simony after the Death of the Parties, 304. A Peer produced as a Witness must be sworn, *ibid.* Evidence in Es-

The TABLE

escape, 304. Evidence of a Prisoner's being in Custody, 305. Evidence of Bastardy, 305. Deceit in the Factor's, Evidence to charge the Merchant, 306

Evidence by Witnesses, Chap. 15. p. 307.

Who may, and who may not be Witnesses, 307 to 312, 314 to 328. Where the Wife shall be admitted to give Evidence, 307. Privilege of Witnesses from Arrest, 310. Depositions of a sick Witness given in Evidence, 311. Deeds lost proved by Witnesses, 312. Juror a Witness, 313. Bail a Witness, *ibid.* When a Witness *subpœna'd* is obliged to appear, and when not, 313, 316. Where a Counsel shall be Witness, and where not, 314. Hearsay-Evidence, 317, 462. Trustee, where he shall be Evidence, and where not, 317, 318, 321. Parishioner, where he may or may not be a Witness, 320, 327. One admitted Evidence of a Fraud upon her self, 313, 327, 328. Witness for Prisoners to be sworn, 324. Where Quakers shall be Witnesses, and where not, 324. Commissioners of Oyer and Terminer, Witnesses, 324. Persons pardoned, where they shall be Witnesses and where not, 323, 326, 475. Partakers in the Crime may be Witnesses against their Fellows, 326. Where Members of Corporations may be Witnesses for their Corporation, and where not, 327. One serving as a Commissioner to examine Witnesses may maintain a *Quantum meruit* for his Pains, 329.

The TABLE.

Evidence relating to Executorship, Wills and Administrations, Chap. 15. p. 330.

Where the Probate of a Will is Evidence, and where not, 331 to 333. Upon *Plene administravit* a Retainer may be given in Evidence, *ibid.* But not by an Executor *de son Tort*, 334. What Evidence the Plaintiff must give where *Plene administravit* is pleaded, 335. Ordinary cannot refuse Probate to an Executor, because he is not sufficient, 336. Executor pleading Judgments with Penalties, must shew how much is really due, 336. Power reserved by a Wife of making her Will, 337. Two Executors join in an Acquittance, but one only received the Money; both are chargeable to Creditors, but the actual Receiver only to Legatees, 338

Evidence by Records, Books, Deeds, and other Writings, Chap. 15. p. 339.

Ancient Deeds allowed in Evidence though not sealed, 339, 346. How Records are proved, 340. Witness must know the Party upon Sight, who proves the Execution of a Deed, 341. Shop-book, where Evidence, 341, 348, 353. Evidence of Fraud, 342. Doomday-Book, where Evidence, *ibid.* Copies of Court-Rolls, Evidence, 342, 348. Votes of Parliament, where Evidence, 342, 347, 348, 349. Bankruptcy proved by Record, 343. Copy of a Deed, where Evidence, 344, 348. A cancelled Deed read in Evidence, 344, 349. Recitals of Records, where Evidence, 345, 349. Deed made by *Dures*, 346. Copy of a Recovery given in Evidence, 348. Fines given

The TABLE.

given in Evidence, 344, 349. Deed not to be admitted in Evidence till stamped, 350. Where Examinations before the Coroner shall be read, 351. What necessary to be proved to charge the Indorfor of a Bill of Exchange, *ibid.* Counterpart, where Evidence, 353. Bills of Exception to the Evidence, must be tendred in Writing at the Trial, *ibid.* Indenture of Bargain and Sale enrolled, given in Evidence without proving the Execution, 355. Depositions before a Justice, Evidence only in Felony, *ibid.* Heralds Books and Parish-Registers allowed to be Evidence, 356

Evidence in Courts of Equity, and the Ecclesiastical Courts, Chap. 15. p. 356.

Where Depositions may or may not be used in Evidence, 357, 358, 359. Answer in Chancery, where Evidence, 356, 358. Witnesses examined *de bene esse*, if Evidence, 358, 360. Decree in Chancery, no Evidence at Common Law, 359. Depositions *in perpetuam rei memoriam*, not to be read while the Party is alive, 360

Evidence in Account, Chap. 15. p. 361.

Account pleaded before two; Account before one is good Evidence, 361. Upon *ne unques son Receiver*, the Defendant can not prove he paid the Money according to Directions, *ibid.*

Evidence in Actions on the Case, Ch. 15. p. 352.

In Actions for Words, what Evidence required, 362, 363. Action for hindering the Plaintiff to sit in a Pew, 362. For executing an illegal Warrant, *ibid.* For stopping up Lights,

The TABLE.

Lights, 363. Evidence relating to Master and Servant, 363, 365, 366. Where any Thing is to be done on request, 362, 365, 368. Act of one Partner, Evidence against the other, 365.

Evidence in Assumpsit, Chap. 15. p. 367.

Assumpsit to the Wife, and the Husband's Agreement, good Evidence of an *Assumpsit* to the Husband, 367. Goods bought by the Wife where Evidence to charge the Husband, *ibid.* *Indebitatus* cannot be maintained upon an Account current, 370. Partners must join in an *Indebitatus*, *ibid.* Acknowledgment of a Debt without a fresh Promise within six Years, is not sufficient, 371. Where Infancy may be given in Evidence, 372. Parol Promise on a Contingency, not within the Statute of Frauds, *ibid.* Where Condemnation in a foreign Attachment shall be given in Evidence, 373.

Evidence in Debt, Chap. 15. p. 375.

What may be prov'd on *Non est factum*, 375. Evidence of the Delivery of an Award, 376. In Debt against an Heir or Executor, what may be given in Evidence, 376, 377, 379. In Debt for Rent, what Evidence required, 378 to 381. What in Escape, 378, 379. Debt for Servants Wages, 381. Acceptance and Acquittance of the last Rent, Evidence that all Arrears are discharged, 382. Payment before the Day, Evidence of Payment at the Day, *ibid.* Where pleading *Plene administravit*, admits the Debt, 383

Ev-

The TABLE.

Evidence in Dower. Chap. 15. p. 394.

Dower of a Rent, 385. Term of Years prior to Title of Dower, must be pleaded and cannot be given in Evidence, 385

Evidence in Ejectment, Chap. 15. p. 386.

Rule to confess Lease, Entry, and Ouster, doth not extend to confess actual Entry upon a Lease that is the Title, 387. Lease of a Guardian, or Copyholder will maintain a Declaration, *ibid.* In Ejectment, the Defendant shall not give in Evidence a former Mortgage, or Conveyance made by himself, 388. A VVill under which a Title to Land is made, must be shewn it self, *ibid.* How a Parson in Ejectment of a Rectory shall make out his Title, 389. Lease and Release given in Evidence that were not indented, and held good, *ibid.* Lease laid a *Die datus*, and Entry the same Day, vicious, 390. VVhat Possession or Entry will prevent the Statute of Limitations, 392

Evidence in Trespass, Chap. 15. p. 393.

VVhat shall be given in Evidence upon Not guilty pleaded, 393. Trespass another Day than what is laid in the Declaration, may be given in Evidence, 394. Trespass may be brought for the mean Profits on a fictitious Lease in Ejectment, 396. Agisted Cattel do Trespass, the Agistor answerable, 398. Officers and those employed by them may plead the general Issue, and give the special Matter in Evidence, 399. Trespass for gleaning, what Evidence necessary, *ibid.* In Trespass excessive Damages, and moved

The TABLE.

for a new Trial, but denied, the Damages being chiefly given for an Injury done the Defendant's Daughter, 400. How Abuttals ought to be proved, *ibid.* In Trespafs for Goods taken, the Defendant upon Not guilty, in Mitigation of Damages, may give in Evidence that the Plaintiff had his Goods again, 404. Tender of Amends a good Bar to a negligent Trespafs, 411

Evidence in Trover, Chap. 15. p 413.
Demand and Denial, good Evidence of Conversion, 413 Trover for an Estray where the Lord refused to deliver it within the Year, 418. An actual taking is Evidence of Conversion without Demand, 415. In local Actions, as Trespafs *quare Clausum fregit*, the Plaintiff must prove the Trespafs where he lays it, and he cannot lay it in any other Place but where it is; but it is otherwise in Trover, and other Transitory Actions, 416
Evidence in Criminal Cases, 462, 463. See Demurrers upon Evidence, 417

F.

False Imprisonment 404, 410

Felony.

How Felons were tried anciently, 16. A Felon may challenge twenty at his Trial, 130, 455. Whether a pardon'd Felon may be a Witness or Jury-man, 85, 314, 316. 319

to 323

Feme Covert, 466. See Baron and Feme.
Fines, *see* Evidence, 344, 438, 444

G.

The TABLE.

G.

General Issue, 393,

ANY Thing may be given in Evidence on the General Issue, which proves the Plaintiff hath no Cause of Action, 401. For the Defendant by Evidence to convey to himself the same Interest and Title, good Evidence, 402. Upon the General Issue, if the Defendant acknowledge he did the Wrong, and justify this, and gives Matter that goes to discharge him of the Act by Justification, this Evidence is not good, but he ought to have pleaded it, 403

Grand Jury, 6, 157, 268

H.

Habeas Corpora, See Venire.

ON the Return of the *Venire facias*, the *Habeas Corpora* or *Distringas* issues to bring in the Jury, 39. They are made returnable the Term after the Circuit, 40. If the Names of the Jurors do not stand in the same Order in the *Habeas Corpora* as in the *Venire*, 'tis good Cause for a new Trial, 205

Habeas Corpora, 452

Hearsay, 317, 462

Heir, 376

Heralds Books, 356

Homicide, 467

The TABLE.

Hundred, see Evidence.

The Lessor living out of the Hundred, though his Estate lies there, may be a Witness for the Hundred, 312. Where a Robbery is done by Day-light, the Hundred are chargeable, though it be before Sun-rise, or after Sun-set, 322

I.

IDeofy, 19

Jeofails, see Visne.

What Jeofails are pardoned by 21 *Jac. cap.* 13, 51. *Venire facias* bearing Date before the Action brought, aided by the Statutes of Jeofails, 58. The principal Statutes relating to Jeofails cited, 59. *Visne* mis-awarded in Part, aided by the Statutes of Jeofails, 119. A Verdict finding Matter against the Record, is Jeofail, 260

Jews,	293
Imprisonment,	467
Impropriation,	406
Indenture,	389
Indictment,	22, 302, 468
Infancy,	12, 372, 469
Infidels,	85

Inquests.

Inquests of Office, of what Number they ought to consist, 80. In what Inquests or Juries a Challenge may be,	143
Institution,	18, 19
Intendment,	264, to 267
Interruption,	469
	Joinder

The T A B L E.

Joinder of Counties,	81
Issues, <i>see</i> Trials, and Chap. 2. throughout.	
Judge,	92
Jurisdiction of Courts,	188
Justifications,	407

Jury, see Tales-men.

The Derivation of the Word, their Office and Antiquity, 1. Facts are determined by the Jury, Matters of Law by the Judge, 6. Of the Grand-Jury, and their Office, *ibid.* Jurors must be lawful Men, 10. Peer in an Appeal, and also in Cases of *Præmunire* shall be tried by a Jury, 10. Bishops shall be tried by a Jury, *ibid.* Why the *Venire facias* requires the Jury to appear at *Westminster*, 63. They shall not appear there in criminal Causes, 64. On a feigned Default of the Jurors a *Distringas* is granted, 65

Jury, their Number.

Must be twelve in a *Petit Jury*, 80. May be more or less in Inquests of Office, 80. Why the Sheriff returns twenty-four when the *Venire* mentions but twelve, *ibid.* When the Jury is to be of two Counties, in what Cases the Inquest shall remain, 81. There must be sixteen Jurors in the Grand-Assize, and twenty-four in Attaint, 82. Where one departs, another may be sworn by Consent, 82. In *Wales* six Jurors were held sufficient, *ibid.* There must be twelve Jurors in a Writ of Inquiry, 84. Rules in striking a special Jury, *ibid.*

Juror, his Qualifications.

Outlaws, Persons attainted, those who have had Judgment to lose their Ears, stand in the

The T A B L E.

the Pillory or Tumbrel, Persons stigmatized or branded, not allowed to be Jurors or Witnesses, 85. Jury of Women to try if a Woman be Enseint, 86. Persons exempted from being on Juries, *ibid.* Jury of Attorneys, *ibid.* Sufficiency of the Jury as to Estate, 88. Not to extend to Corporate-Towns, *ibid.* Or to such Actions as have not their ordinary Trial by twelve Men, *ibid.* Where the King is concerned, less Freehold is required, 89. Court may order a Jury of better Quality to be struck, 90. Juror must not be of Affinity to either Party, 92. The King may exempt Persons from serving, 93. Apothecaries are exempted by Parliament, *ibid.* And registered Seamen, 94. How Jurors shall be returned by the late Acts, 94, 95. Special Writs where the Jury shall have the View, 93, 95. Juror a Witness, 313

Jurors, the Visne or Place from whence they shall come.

The *Venue* must be from the Neighbourhood of the Place where the Fact is laid, and not from the Place it self, 96. A Parish shall be intended to contain but one Vill unless the contrary be shewn, 97. Of the *Venue* within Towns, 98. The *Venue* shall follow the Issue, *ibid.* When the Jury shall come *de Corpore Com'*, and when from a Town, &c. Several Issues where the *Venue* shall be *de Corpore Com'*, 100, 101. Deeds, &c. made beyond-sea, from whence the Jury shall come, 102. Full Age tried by a Jury where the Land lies, *ibid.* Transitory Actions, by what Jury tried, 103. Criminal Matters must be tried by a Jury where

The T A B L E.

where the Offence was committed, 103. Jury shall not come from a Ward or Hundred, 105. They may come from the Neighbourhood of a City, 106. No *Venue* shall be of an Honour, 108. Jury shall come from a Place where the Fact is best known, 109. Where a Jury may be Part of one County and Part of another, and where not, 110. In *Escape*, from whence they shall come, 111. Where the Jury shall come from a County adjoining, 113. *Venue* to be guided by the Issue, 114. Where a *Venue* misawarded is aided by the Statute of Jeofails, 119. Where the Issue is local, the *Venue* cannot be changed by Consent, 120. *Venue* altered because a Peer was Party, 121. In Civil Actions, the Jury shall be from the Body of the County by a late Statute, *ibid.*

Jury, their Enquiries.

The Jury may take upon them the Matter of Law as well as Matter of Fact, and include both in a general Verdict, 186. They may sometimes enquire of a Man's Intent, 187. And in some Cases of Divorce and Matrimony though of Spiritual Conusance, 187. Of Things done in another County or Kingdom, 188. May enquire of Estoppels where the Parties are estopped to plead them, 189. But cannot find contrary to what is agreed in the Pleadings, 189. And the Jury is bound by Estoppels, unless the Party leaves the Fact at large by pleading, 191

Jurors

The TABLE.

Jurors, their Oaths ; and Trials per Medietat. Lingua.

Their Oath, 192. Formerly they were all Knights, 193. The Antiquity of Trials *per medietat. Lingua*, *ibid.* Any Foreigner disinterested may be on such a Jury, 194. Twelve Denizens and twelve Aliens to be returned, 195. Where both Parties are Aliens, the Inquest, shall be all *English*, *ibid.* If the Trial be by all *English*, 'tis not Error, 196. When an Alien shall pray a *Venire de medietate Lingua*, *ibid.* The *Tales* must be agreeable to the *Venire*, 196. Alien Executors, the Trial shall be by all *English*, 197. Insufficiency of Freehold, &c. no Cause of Challenge to an Alien, 197

Fury, of their Demeanour.

Jurors may not eat or drink but by Assent of of the Justices, and of the Parties, 199. Where the Jury cannot agree, or one of them happen to die, a new Inquest may be awarded, 200. If the Jury eat at their own Charge, it will not avoid the Verdict, but they are finable, *ibid.* If a Juror takes any Writing out of Court that was not given in Evidence, it avoids the Verdict, 201. They shall be kept without Fire or Candle, and shall speak to no Body, *ibid.* In Case of Life or Member, no privy Verdict can be given, *ibid.* Nor in that Case can a Jury-man be discharged, 202. Jurors fined for eating and drinking, and having Fruit in their Pockets, *ibid.* For having Sweetmeats about them, 203. They may be carried after the Judge in Carts, where they cannot agree, 204. A Witness examined by

The TABLE.

by them after their Departure out of Court, avoids the Verdict, 204. One of the Parties speaking to them in order to bias their Judgment, avoids the Verdict, 205. Taking a Book given in Evidence, but not delivered them by the Court, avoids the Verdict, 206. Affidavits of the Jurors will not be admitted to make good their Verdict, 207. Juror being an Evidence to be examined in open Court, 209. Juror departing, fined; and another sworn by Consent, *ibid.* Giving their Verdict by Lot, a Misdemeanour, and Cause of a new Trial, 210. No new Trial for or against the King, *ibid.* A Treat after a privy Verdict shall not avoid it, 211. Unless it induces them to change their Verdict, 212. Words of Salutation to the Jurors by either of the Parties shall not avoid the Verdict, *ibid.* Tipstaffs fined for not keeping the Jury from Wine, 213. One committed for sending to know the privy Verdict, *ibid.* What Writings the Jury may carry out of Court, 297, 300

Jurors, Punishments they are liable to.

If a Juror take a Bribe and be attainted at the Suit of a Stranger, he shall be fined and imprisoned for a Year, and the Prosecutor shall have half the Fine: And if either of the Parties bring an Action against him, he shall recover Damages, 214. Such Juror shall never serve on an Inquest again, *ibid.* A Juror so bribed shall forfeit ten Times as much as he receives, (from whence the Term *Decies tantum*,) 216. An Embracior is he who procures such corrupt Inquests, *ibid.* Ambidexter is a Jury-man who takes a Bribe on both Sides, 217. At-
torney's

The T A B L E.

torney's Practice censured in these Cases, <i>ibid.</i> The Plaintiff may entreat a Juror to appear, but a Stranger may not, 218. Ju- rors may receive Money after their Ver- dict given, <i>ibid.</i> Jurors finable for bring- ing in a Verdict before they are all agreed, 219. They must be fined separately, 220. The Punishment for striking a Juror, <i>ibid.</i> Ten Shillings to be returned in Issues on every Person impanelled, <i>ibid.</i> The Judg- ment in a Writ of Attaint, 222. The Jury are not finable for going against Evidence, 225. A Verdict given by a former Jury gi- ven in Evidence, 22;	
Juries in capital Cases	470
Justices of Peace,	22, 399, 465

K.

Knights.

F OUR Knights to be upon the Jury in a Writ of Right, which is called the Grand- Affize, 82. Anciently the Jury were all Knights,	19;
---	-----

L.

L EASE, <i>see</i> Evidence.	
L egatee, <i>see</i> Evidence.	
Libel,	355
Limitations, the Statute, <i>see</i> Evidence.	
London, the Customs, how tried,	14

M.

The TABLE.

M.

M Arriage, <i>see</i> Baron and Feme.	
<i>Medietas Linguae</i> , <i>see</i> Trial.	
Misnosmer,	114, 154
Murder and Manslaughter,	254

N.

<i>Nisi prius</i> , <i>see</i> Venire.	
W HEN first given, 64. The Court	
may refuse to grant it, 65. Power	
of Justices of <i>Nisi prius</i> , 66, 76. No Re-	
pleader to be awarded after a Default at	
<i>Nisi prius</i> ,	78
Nonage, <i>see</i> Infant.	
Nonsuit,	202

O.

O A T H, 472. <i>See</i> Evidence.	
Officers, 399. <i>See</i> Evidence.	

Ordalia.

Trials by hot Iron, hot Water, cold Water,	
&c. anciently used, 3. By hot Iron and	
hot Water, 16. Freeman were tried by	
hot Iron, Slaves by hot Water,	20
Ordinary,	336
Overt-Act,	473

Outlawry.

Juror must not be an Outlaw, 85, 149, If	
he be outlaw'd the Verdict is naught, 152.	
2	On

The TABLE.

On reversing the Outlawry the Party is re-
stored, and may have Trespass,

409

P.

Pardon.

WHether one attainted of Felony and pardoned, may be of a Jury, 314.
Whether one convicted of Felony and pardoned, may be a Witness, 316, 318, 319.
A Felon pardoned may be a Witness, but one that has been convicted of Perjury never can, 323, 326, 475. Where one sues out his Pardon, what is necessary to be done, 475
Parishoner, 320, 327
Parol-Promise, 372. See Evidence.
Particeps Criminis, 326, 476
Partition, 443
Partners, 370

Peers.

Who shall be tried as Peers, 10. How Peerage shall be tried, 12. A Peer cannot be challenged in a Trial by Peers, 131. A Peer exempted from serving on Juries, 132. A Peer produced as a Witness must be sworn, 304. May be covered after his Evidence is over, 455. No Evidence to be admitted against the Honour of a Peer who is a Witness for the King, *ibid.*

Perjury.

Who may be a Witness in Actions or Indictments of Perjury, 312. The Prosecutor on the Statute of the 5 Eliz. for Perjury, cannot be a Witness, 322
Petit

The TABLE

Petit Cape,	20
Play for Money,	374

Plea, see Evidence.

In personal Actions against several Defendants and several Pleas, the Plea that goes to the whole shall be tried first, 24. *Plea puis darrein Continuance*, 67, 173. Counter-Plea to a Challenge, 127. One is estopped to plead a Deed was delivered before the Date, but he may plead a Delivery after the Date,

	234
Plenary, by whom tried,	17
Possession,	298, 303, 392
<i>Postea</i> amended,	248
Presumptive Evidence,	292, 303
Prisoners,	305, 324, 450, 479.
Probate, 336. <i>See Evidence.</i>	
Profession,	17
Promise, <i>see Evidence in Assumpsit.</i>	
Proof, 292. Proof of Hand-Writing, 477.	
<i>See Evidence.</i>	
Proviso,	60

Q.

Q Uakers disabled to serve on Juries, 95.	
Where a Quaker may be a Witness, and where not,	324
Quashing Indictments,	477
<i>Quo Warranto</i> ,	97

R.

R ecords, 10. <i>See Evidence.</i>	
Recoveries, 348. <i>See Evidence.</i>	
L I	Recusants,

The TABLE.

Recufants,	312, 321
Request,	362, 365, 368
Relignation,	18
Robbery, <i>fee</i> Hundred.	

S.

Sheriff.

WHERE a Writ may be awarded either to the Escheator or Sheriff, 17. Whether a Return were made to be tried by the Sheriff, 19. If the Question be, Whether such a one is Sheriff, it shall be tried by the Record, 19. The Office of the Sheriff, 39, 40. Where a *Venire facias* shall not be directed to him, 40, 41, 42, 150. Where there are two Sheriffs, both must join in the Return of Process, 59. How the Sheriff shall summon and return the Jury, 91

Simony,	304, 390
Solicitor,	317
<i>Subpœna</i>	313, 316
Surplufage,	236

T.

Tales.

TALES at Common Law, 68. *Tales* by Statute, *ibid.* In what Cases a *Tales* shall be granted, 69. *Tales* denied, 70. One in Orders may be impanelled on a *Tales*, 71. The Array of the *Tales* cannot be challenged, but the Polls may, *ibid.*
The

The P R E F A C E.

So that he which gives himself to the Study of Divinity, may here fill himself with holy and pious Principles of Divine Laws : For, *Lex est sanctio sancta jubens honesta, & prohibens contraria ; sanctum etenim oportet esse, quod sanctum definitum* : The Law is a holy Sanction, or Decree, commanding Things that be honest, and forbidding the Contraries : Now the Thing must needs be holy, which by Definition, is determined to be holy. So that in this respect, saith *Fortescue*, Men may well call Lawyers, *Sacerdotes*, that is, Givers or Teachers of Holy Things. For the Laws being Holy, it follows that the Ministers and Setters forth of them, must be Givers of Holy Things ; and so by Interpretation doth *Sacerdos* signify ; and doubtless, he which duly considers those Rules of *Theology*, which lie scattered throughout the whole Body of the Law, must needs conclude our Laws to be Commentaries upon the Old and New Testament ; and do so much bear the Image *Legis Divine*, that they may well be attributed to the most High.

The PREFACE.

The Rules of *Grammar*, *Philosophy Natural*, *Political*, *Oeconomick* and *Moral*; as also the Grounds of *Logick*, and of other Arts and Sciences, so much abound in our Books, that the very reading of the Law, will make a Man *Master* of those Sciences.

And since *Rhetorick* is, *Ars orate dicendi*, and consisteth of those two Parts, *Elocution*, and *Pronunciation*; How can we read in our Law Books, those learned Arguments, elegant Speeches and Judgments, pronounced with such Eloquence and Elegance of Words and Matter, and not conclude, That *Rhetorick* is the Glory and Grace of a Lawyer? though some (not gifted that Way) would perswade us that the Law hath little Relation to it.

If any Man be delighted in History, let him read the Books of Law, which are nothing else but Annals and Chronicles of Things done and acted from Year to Year, in which every Case presents you with a petit History; and if Variety of Matter doth most delight the Reader, doubtless, the reading of those Cases, (which differ like Mens Faces) though like the Stars in Number, is the most pleasant Reading in the World.

I thought

The PREFACE.

I thought to have expatiated my self in this Eulogical Commendation of the Study of the Law ; but when I consider the Glory of the Thing it self, I think it but in vain to light the Sun with Candles ; and as no Arguments will persuade one to love against Nature ; so he whom the Excellency of the Law it self cannot invite to study it, will never be forced to it with the Fist of Logick, or other Perswasion : Wherefore 'tis now Time to expose my self to the Censure of the Reader, who always judges according to his Capacity or Affection ; for which Cause, if I were to chuse my Reader, I could wish with *Caius Lucilius*, *Quod ea quæ scribo, neque ab indoctissimis, neque a doctissimis legi, quod alteri nihil intelligerent, alteri plus fortasse, quam ipse de se* : That this Treatise might not be read of the most learned, nor of those who are not learned at all, because these understand nothing, and the others more perhaps than my self.

However, I put this Request to all, *Ut* Brañon, Lib. 1. fol. 1.
si quid superfluum, vel perperam positum in hoc opere intervenerit, illud corrigant, & emendent, vel conniventibus oculis pertranscant : Cum omnia habere in memoria, & in
[a 2] nullo

The PREFACE.

nullo peccare, divinum sit potius quam humanum : That if any Thing be superfluous, and placed amiss in this Work, that they will either correct and amend it, or without carping connive at it ; since to remember to do all Things right and nothing amiss, is rather the Part of a God than Man : Wherefore, let him which never offended, cast the first Stone.

The TABLE.

The Time of granting them, their Number, Order and Quality,	72
Tender of Amends, a Bar to a negligent Trespass,	411
Trade,	14
Transitory Actions,	103
Traverse, 22. See Evidence	

Treason.

The Trial of Treason anciently by Battel,	
16. Challenges in Cases of Treason, 130, 157, 455. Persons indicted of High Treason cannot be found guilty of Misprision of Treason, 478. A Man cannot be indicted of High Treason above three Years after the Offence committed,	478
Trespass, 393. See Evidence.	

Trials.

Trials Ordeal, 3. Trial defined, 6. Facts to be tried by the Jury, Matter of Law by the Judge, 7. Trials by Certificate, <i>ibid.</i> Records tried by themselves, 9. Peer upon an Indictment to be tried by his Peers, but upon an Appeal he must be tried by a Jury, and in Cases of <i>Præmunire</i> by a Jury, 10. Nonage to be tried by the Inspection of the Court, Maihem by View of the Court, 11. Death of the Husband in Dower, Summons and Challenge of a Juror to be tried by Examination of the Parties, and Witnesses, 12. Nobility to be tried by the King's Writ, <i>ibid.</i> Ancient Demesne by <i>Doomsday</i> , 13. Criminal Matters must be tried by a Jury, 14. Matters of Fact mixed with Matters of Record to be tried by the	Country,
L 1 2	

The TABLE.

Country, 15. Trials by Battel, 16. Trials Ordeal described, *ibid.* Trial by Wager of Law, 17. Admission, Institution, Plenary, Avoidance, Ability, General Bastardy, Espousals and Divorce, how tried, 18, 27. Ideosy to be tried by the Court of Chancery, 19. Trials by the Marshal's Certificate, by a Messenger, by Examination and by the Almanack, 20. Trials Ordeal prohibited by Parliament, Trials by Battel prohibited only by the Canon, 21. One not compellable to try a Traverse the same Sessions he makes it, 22. What Courts may inquire and determine the same Day, *ibid.* Where are several Issues, which shall be first tried, 23. Where a new Trial shall be granted, 25. What Notice of Trial is Good, 26, 37. Trial by Proviso, 26. Where full Costs shall be had upon Trial, 28. Where a Trial may be after the Death of one of the Parties, 30

Trials per medietatem Linguae.

Their Antiquity, 193. It is not material what Kingdom Aliens are of, 195. When the Alien must pray a *Venire per medietatem Linguae*, 196. Where the Trial of an Alien shall be by all *English*, 197
 Trials in Capital Cases, 478
 Trover, 413. See Evidence.
 Trustee, 317, 318, 321

The TABLE.

U.

Variance, *see* Verdict, 301 to 303

Venire facias.

Form of the Writ, 38. To whom it shall be directed, 40. When to the Coroner, 42. When to Ellisors, 43. *Venire* may be directed to a wrong Officer by Consent, 47. Of altering the *Venue*, 49. Defects in the *Venire*, 53. Where there must be a *Venire de Novo*, 54. Where several *Venire facias*'s, 57. Mistakes in the *Venire*, 58. *Venire facias* by Proviso, 60, 62. Why the *Venire* runs to have the Jury appear at *Westminster*, 63

Verdict, see Jury.

Derivation of the Word, 229. General and special Verdicts, their Difference, 230. The Court cannot refuse a general Verdict if the Jury will take the Law upon themselves, 233. Of uncertain Verdicts, 235. Of partial Verdicts, 236. When a Defective Verdict may be supplied by a Writ of Enquiry, 241. Verdicts set aside for Insufficiency in the Declaration, 243. Verdict amended by the Notes, 246. An ill Plea made good by the Verdict, 249. Of what a Verdict may be, and how it shall be construed, 252. What the Jury may find, 255, 261. Of open and privy Verdicts, 257.

The TABLE

Where the Jury may change their Verdict, 258, 274. For whom the Verdict shall be said to be found, 266. If the Substance of the Issue be found it is sufficient, 273. A Verdict may be given without or against Testimony, 279. The Verdict will aid a Title defectively set forth, but not a bad one, 282, 283. Where there ought to be four Days between the Verdict and the Judgment, and where not, 284, 288, 451. A privy Verdict may be taken in an Information, but not in Treason or Felony, 285. Where a Verdict is amendable, and where not, 286. Discontinuance may be after a special Verdict, 291. Two Counts in the *Nar'* for Things of the same Kind, not averred to be different, helped by the Verdict, *ibid.*

View,

93, 95.

Visne, 96 to 121. See Jury.

Usury.

Party to a usurious Contract cannot be a Witness, 312. Upon an Information on the Statute for Usury, the Borrower may be a Witness if he has paid the Money,

322

W.

Wager of Law.

WHERE a Trial may be by Wager of Law, and the Manner of it, 17. In

A Summary of the Contents of each Chapter in this BOOK.

C H A P. I.

THE Derivation of the Word, (*Jury*,) The
Definition, Antiquity, and Excellency of
Juries, by way of Preface. Page I

C H A P. II.

Of an Issue; and the divers Sorts of Trials thereof; and when a Trial shall be by a *Jury*, and when not: When by the Spiritual Law, when by Certificate, when by Battel, when by an Almanack, &c. What Issue shall be first tried Per Pais, what by the Court; and what by Examination of the Attorney, Sheriff, &c. 5

C H A P. III.

Of a *Venire facias*; to whom it shall be directed; when to the Sheriff, when to the Coroners, when to *Ellifors*, and when to Bailiffs; when well awarded, &c. 38

C H A P. IV.

What Faults in the *Venire facias* shall vitiate the Trial, what not; when a *Venire facias* de
I de

The CONTENTS.

de novo shall be awarded ; when several Ven. fac. when the Ven. fac. shall be between the Party, and a Stranger to the Issue. Who may have a Venire facias by Proviso, and when

Page 51

CHAP. V.

Why the Venire facias runs to have the Jury appear at Westminster, though the Trial be in the Country ; Of the Writ of Nisi prius, when first given, when grantable, when not, and in what Writs of the Justices of Nisi prius. Of the Tales at Common Law, and by the Statute ; when the Transcript of the Record of the Nisi prius differs from the Roll, whereby the Plaintiff is nonsuited, he may have a Distringas de novo

63

CHAP. VI.

Of the Number of the Jurors, and why the Sheriff returns twenty-four, though the Venire facias mentions but twelve. If he returns more or less, no Error ; and of the Number twelve. And when the Trial shall be per primer Jurors. And of Inquests of Office. And when to remain pro defect. Jurator.

79

CHAP. VII.

Who may be Jurors, who not ; who exempted, and of their Quality and Sufficiency

85

CHAP. VIII.

Concerning the Visne, from what Place the Jury shall come, &c.

96

CHAP.

The CONTENTS.

CHAP. IX.

Of Challenges to the Array, &c. 122

CHAP. X.

Of what Things a Jury may inquire, when of Spiritual; when of Things done in another County or in another Kingdom; when of Estoppels, and when not; when of a Man's Intent, &c. 185

CHAP. XI.

The Juries Oath; why called Recognitors in an Assize, and Jurors in a Jury. Of the Trial per medietatem Lingux; when to be prayed, and when grantable. Of a Trial betwixt two Aliens by all English. Of the Ven. fac. per medietatem Lingux, and of Challenges to such Juries 192

CHAP. XII.

How the Jury ought to demean themselves whilst they consider of their Verdict; when they may eat and drink, when not; what Misdemeanour of theirs will make the Verdict void: Evidence given them when they are gone from the Bar, spoils their Verdict: For what the Court may fine them, and where the Justices may carry them in Carts, till they agree of their Verdicts. An Amerciament affeer'd by the Jury 199

CHAP.

The CONTENTS.

CHAP. XIII.

What Punishment the Law hath provided for Jurors offending; as taking Reward to give their Verdict. Of Embraceors, Decies tantum. Attaint. Several Fines on Jurors; what Issues they forfeit, and of Judgment for striking a Juror in Westminster, &c. Page 214

CHAP. XIV.

The Learning of general Verdicts, Special Verdicts, privy Verdicts, and Verdicts in open Courts, and where the Inquest shall be taken by Default. Inquests of Office, Arrests of Judgment, Variance betwixt the Nar. and the Verdict, &c. 229

CHAP. XV.

Of Evidence 292

CHAP. XVI.

Brief Observations relating to Trials in capital Cases 448

Trials

***The* TABLE**

In Wager of Law none can be challenged for Favour or Insufficiency,	145
Warranty,	438
Waste,	93
Wills, 13, 130, 388. See Evidence.	
Witnesses, <i>see</i> Evidence.	
Women, 457. See Baron and Feme.	

FINIS.



